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REPORTS OF CASES

DETERMINED IN

THE SUPREME COURT

OF THE

STATE OF NEVADA

**DURING JULY AND OCTOBER TERMS, 1912, AND
JANUARY TERM, 1913**

REPORTED BY

JOE JOSEPHS

CLERK OF SUPREME COURT

AND

JOHN E. RICHARDS, Esq.

ATTORNEY AT LAW AND OFFICIAL COURT REPORTER

VOLUME XXXV

CARSON CITY, NEVADA

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1913**



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1912

Justices of the Supreme Court

HON. J. G. SWEENEY.....CHIEF JUSTICE
HON. G. F. TALBOT }
HON. F. H. NORCROSS }-----ASSOCIATE JUSTICES

Officers of the Court

HON. CLEVELAND H. BAKER*...ATTORNEY-GENERAL
HON. JAMES R. JUDGE†...DEPUTY ATTORNEY-GENERAL
HON. JOE JOSEPHS.....CLERK
JOHN E. RICHARDS, Esq....OFFICIAL COURT REPORTER
MR. EDWARD REGAN.....BAILIFF

*HON. CLEVELAND H. BAKER died December 5, 1912, and HON. GEO. B. THATCHER was appointed his successor.

†HON JAMES R. JUDGE died July 31, 1912, and HON. E. T. PATRICK was appointed his successor.

1913

Justices of the Supreme Court

HON. G. F. TALBOT	-----	CHIEF JUSTICE
HON. F. H. NORCROSS	} -----	ASSOCIATE JUSTICES
HON. P. A. McCARRAN		

Officers of the Court

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MR. JOSEPH STERN	-----	BAILIFF

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HON. F. P. LANGAN	FIRST DISTRICT
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HON. T. F. MORAN	SECOND DISTRICT
HON. COLE L. HARWOOD*	SECOND DISTRICT
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HON. L. N. FRENCH	EIGHTH DISTRICT
HON. B. W. COLEMAN	NINTH DISTRICT

*HON. JOHN S. ORR resigned January 1, 1913, and HON. COLE L. HARWOOD was appointed his successor.

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REPORTS OF CASES
DETERMINED IN
THE SUPREME COURT
OF THE
STATE OF NEVADA

JULY TERM, 1912
(MONTH OF SEPTEMBER)

[No. 1949]

**STATE OF NEVADA, EX REL. GEORGE SPRING-
MEYER, RELATOR, v. CLEVELAND H. BAKER,
RESPONDENT.**

[No. 1950]

**STATE OF NEVADA, EX REL. JOHN W. LEGATE,
RELATOR, v. JOE JOSEPHS, RESPONDENT.**

**1. QUO WARRANTO—ELECTION CONTESTS—BALLOTS AND ELECTION
RETURNS—ADMISSIBILITY IN EVIDENCE.**

Rev. Laws, 5409, providing that a public record in the custody of a public officer in a public office may be admitted in evidence by the certificate of the custodian that it is genuine, affects the admissibility of the specified character of evidence, but not the method of the production thereof in court, and the supreme court in *quo warranto* involving an election contest has no authority to direct the county clerk of a county to certify to the court the ballots and election returns of the precincts of the county for the election.

**2. ELECTIONS — BALLOT BOX — CERTIFICATE OF COUNTY CLERK —
SUFFICIENCY.**

A certificate of the county clerk of a county attached to a ballot box of a precinct in the county, which recites that he certifies that to the best of his knowledge and belief there are within the ballot box, so inclosed that it cannot be opened without destroying the certificate, the ballots cast at an election and the election returns, and that to the best of his knowledge and belief the ballots and returns are genuine, does

Argument for Relators

not comply with the statutory requirements because it fails to show that the box and its contents were in his custody and in his office, or that the box and its contents are the genuine and authentic election records and documents of the precinct, and the ballot box is inadmissible in an election contest.

3. ELECTIONS — BALLOT BOX — CERTIFICATE OF COUNTY CLERK — SUFFICIENCY.

Rev. Laws, 1795, providing for the deposit of ballots and election returns in the office of the clerk of county commissioners, and that they shall not be subject to the inspection of any one except in cases of contested elections, and then only by the judge or body before whom the election is contested, is not repealed by a subsequent statute embodied in section 5409, providing that a public record in a public office may be admitted in evidence by the certificate of the custodian, and ballots must remain in the custody fixed by law except when their removal is authorized by some court, and ballots are not admissible in evidence in an election contest under the certificate of the clerk when they have been out of his official custody subsequent to the making of the certificate, at least in the absence of a proper foundation for their admission having been laid.

4. ELECTIONS — BALLOTS — CERTIFICATE OF CUSTODIAN OF PUBLIC RECORD—STATUTES—"PUBLIC DOCUMENTS."

Under Rev. Laws, 1795, providing for the deposit of ballots and election returns in the office of the clerk of county commissioners, and declaring that ballots so deposited shall not be subject to the inspection of any one except in cases of contested elections, and then only by the judge or body before whom the election is contested, ballots and election returns duly deposited are public documents within section 5409, providing that a public document in the custody of a public officer may be admitted in evidence by the certificate of the custodian thereof that it is genuine and authentic.

ORIGINAL PROCEEDING in *quo warranto* to determine the legality of the election of respondents to the offices of Attorney-General and Clerk of the Supreme Court, respectively.

Question as to the admissibility of the election returns upon the certificate of the county clerk. For decision upon the merits, see same case, *post*.

The facts sufficiently appear in the opinion.

George Springmeyer, for Relators:

Section 467 of the new civil practice act (Rev. Laws, 5409) is plain and specific. From time immemorial judicial

Argument for Respondents

records have been admissible by the certificate and seal of the legal custodian. So, too, have many other public or official or semiofficial documents been admissible in the same way. (Wigmore, secs. 1645, 1675, 1676.)

To admit election records upon certificate and seal is no extension of the law, is not unique nor an innovation. The principle is the same throughout, the theory being that official statements are entitled to a certain sanctity and consideration, just as are dying declarations and other exceptions to the hearsay rule. (Wigmore, secs. 1631-1635, 1675, 2161, 2534.)

While in transit the records are in *custodia legis*, and, accordingly, it is assumed that they will be safely kept.

The legislature may deprive of the right of cross-examination and shift the burden of proof. There are many exceptions to the right. (Wigmore, sec. 1392.)

Respondent's own authorities disprove his contention that election returns are not public records or documents. See, also, Black's Law Dict., 2d ed. 386.

Cleveland H. Baker and James R. Judge, for Respondents:

The legislature, in attempting to make provision for the admission in evidence of "a public record or document, in the custody of a public officer of this state, in a public office," had in view that particular class of public records and documents referred to and recognized as such by legislatures, courts and such other deliberative bodies, as well as authors, law writers and attorneys, since they have a well-defined meaning and one that is well understood and recognized by the courts.

Are election ballots and election records public records or public documents? If so, when, where or in what proceeding were they so adjudicated? No such ruling has been made by any court of last resort, for the good and sufficient reason that the law relating to elections and the provisions for the custody and safe-keeping of the ballots after they have been delivered to the respective county clerks, negatives absolutely the idea that

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they are public records, their inspection or examination being prohibited, save in cases of contests or recounts; their lodgment with the county clerks is but temporary, and to give the public access to them would be to deprive the voters of the benefits intended to be conferred upon them by the enactment of the Australian ballot law.

To so hold would of necessity result in depriving respondent of the right to show, if such fact exists, that the ballots were not, while in the custody of the clerk, kept in a secure and proper manner as required and contemplated by the election laws; again, the clerk executing the certificate was not, as has been shown in several instances in the case at bar, the clerk to whom the ballots were delivered by the election officers, some of the clerks having qualified in the first instance and assumed the duties of the office on the first of the present year, while no proof as to their being the same ballots delivered to the former clerk is required. Here again the certificate could not extend back of the date upon which the ballots and election returns were delivered to them; in such case, the respondent, if the certificate be all controlling, as claimed by relator, is without the right to show, if such be the fact, that the ballots and returns are not in the same condition as when originally delivered to the clerk having charge of the office when the election was held, and that they were not properly kept or preserved as directed by the election law.

By the Court, SWEENEY, C. J., dissenting in part:

[1] Counsel for relator applied to the court for an order directing the county clerk of Storey County to certify to this court the ballots and other election returns of the several precincts of that county for the general election held in 1910. This application was made upon the following provision of section 467 of the new practice act (Rev. Laws, 5409): "A public record or document in the custody of a public officer of this state, in a public office, may be proved and admitted in evidence in any court by the certificate of the legal keeper or custodian thereof

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that it is genuine and authentic, and by his seal, if there be one annexed." This motion was denied for the reason that there was no provision of law for such an order; the provision of the section in question affecting the admissibility of a certain character of evidence and not the method of its production in court. Subsequently, relator offered in evidence the ballot box of one of the precincts of Lyon County, to which was attached the certificate of the clerk in the following form: "State of Nevada, County of Lyon—ss.: I, Chas. A. McLeod, county clerk of Lyon County, State of Nevada, do hereby certify that to the best of my knowledge and belief within this receptacle, which is so inclosed that it cannot be opened without destroying this certificate, there are contained all the election ballots cast in Sutro precinct, Lyon County, State of Nevada, at the general election held on November 8, 1910, and all the election returns, pollbooks and tally lists there used. And I do hereby certify that to the best of my knowledge and belief the said election ballots, returns, pollbooks and tally lists are genuine and authentic. In witness whereof, I have hereunto set my hand and affixed my official seal, at my office in said county, this 12th day of February, A. D. 1912. [Signed] Chas. McLeod, County Clerk of Lyon County, State of Nevada. [Seal.]" Objection to the offer was made by respondent upon several grounds. It was agreed that the offer and objection should stand for the purpose of a ruling and that the contest should proceed as it had theretofore been conducted until a ruling was made upon the offer.

[2] I think that the certificate attached to the ballot box offered in evidence fails to meet the requisites of the statute and is insufficient to authorize its admission in evidence. It fails to show that the box and its contents were in the custody of the officer and in his office, or that the box and its contents are the genuine and authentic election records and documents of the precinct in question. The certificate must meet the requirements of the statute before the records or documents are admissible as

originals. The objection under consideration must be sustained upon the ground of insufficiency of the certificate.

In order, however, that the question desired to be presented by relator may be passed upon fully, in view of the fact that if the contest proceeds counsel for relator could present the same question by amending the certificate so as to comply with the provisions of the statute in so far as raising the point he desires passed upon, we will assume that a certificate meeting all of the contentions of counsel for relator was before us for consideration and give to the statute in question a construction upon the point urged by relator.

A careful reading and consideration of the election laws pertaining to the care, custody, and control of ballots must be given in connection with the section of the statute singled out by relator to support his contention.

The method of carrying on elections and election contests, the casting, care, custody, and preservation of the ballot, and in fact the whole subject of elections, have received as much time and consideration of our legislature as possibly any other one subject which has come before it for consideration. The issue of "Purity of Elections" and the desire to protect by law, in so far as legislation may do, and to give an untrammelled expression of the people's will, free from all taint of fraud and corruption, has been as keenly urged in Nevada as in any state in the Union, and in consequence our legislature has attempted to not only provide for laws insuring an honest election, but to safeguard the ballot, which, when cast, is expressive not only of the popular will, but is the title proper to the office of the officer-elect.

[3] To protect this title our legislature, among other provisions of our election laws, by section 1795 of the Revised Laws, provides how the inspectors of election, after the ballots have been cast, shall file and make their returns, the manner of delivery and with whom the ballots shall be deposited and who shall be their custodian, and among other provisions in said section it is expressly provided: "After the ballots have been cast, counted

and deposited * * * that the ballots so deposited with the board of county commissioners *shall not be subject to the inspection of anyone, except in cases of contested elections, and then only by the judge, body or board before whom such election is being contested.*" Having so provided, can it be said that the legislature intended to imply that ballots are "public records or documents" in the sense that they may be sent without the especial custody of the officer in charge of the same in violation of this particular statute, and, if so, forwarded to the court before which an election contest is being considered, and was it meant to imply that ballots should be admitted in evidence without being produced by the custodian who is especially enjoined by law to retain them in his keeping until they shall be inspected by the "judge, body or board before whom said election is being contested"? I do not so believe. Neither do I believe that a ballot can be considered a "public record or document" in the sense and purpose contended for by relator under section 5409, *supra*.

The term "document" has a very broad significance, and has very properly been defined in Cyc., as follows: "That which conveys information; that which furnishes evidence, or proof; a written or printed instrument; an instrument upon which is recorded, by means of letters, figures, or marks, matter expressed and described upon it by marks capable of being read; any matter expressed or described upon any substance by means of letters, figures, or marks, or by more than one of these means, intended to be used, or which may be used, for the purpose of recording that matter; anything bearing a legible or significant inscription or legend; anything that may be read or communicating an idea (including thus a tombstone, a seal, a coin, a signboard, etc., as well as paper writings); all material substances on which the thoughts of men are represented by writing or any other species of conventional mark or symbol." (14 Cyc. 824; Words and Phrases, vol. 3, 2153; Words and Phrases, vol. 6, 5786, 5818.) But to become or to be entitled to

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be considered a "public document or record," in the sense our statute contemplates, it should meet the test which the plain, broad, ordinary conception of the word "public" implies, to wit, subject to open and public inspection and review. Our statute provides that ballots when deposited shall not only not be subject to "public" inspection, but expressly provides for their secretive custody and subject to the inspection of no one save the judges or others conducting an election contest. It is proper to observe, in this connection, that our legislature has never attempted to withhold from the inspection of the public any other "public document or record," as generally understood by the public, and I do not believe that they ever intended ballots to be considered "public documents or records" for the purpose sought by relator.

No authority has been cited to this court, nor have I been able to find any, wherein a ballot or ballot box was ever considered a "public document or record," for the purpose contended for by relator, and in view of the fact that ballots are not public in the sense that they can be viewed by every one or as "public documents or records" imply they may be and are subject to the inspection of none save persons expressly designated by statute, and compelled to be kept in secret file and custody, gives me reason to believe that no such authority can be found to sustain relator's contention that they are. The ballots of a state electorate are in effect the title to the offices of those selected by the people, and are zealously and jealously guarded by law, and as a matter of public policy are rightfully surrounded with its every safeguard against loss or fraud. Nor do I believe that the custodians of the ballots prescribed by our statute would be authorized or warranted, upon the stipulation of counsel in a contest case, to allow the ballots out of their custody, or to deliver them into the custody of others than as designated by law. The ballots not only represent the title to the office involved in the contest, but are the title of all the other offices, and these officers as well as the public have rights which cannot be jeopardized or stipulated away contrary

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to the statute for the convenience or the possible saving of some expense of the contesting parties in a particular contest.

Instancing the legislative intent to preserve and conserve the evidence on which an officer-elect may rely, when the title to his office is questioned, the fallacy of the position of counsel for relator may be more apparent when we illustrate that if we were to hold with relator that upon the mere placing of a certificate upon the ballot box, say by the county clerk of White Pine County at Ely, certifying that it contained the ballots of White Pine County, and upon their arrival in Carson City they were offered and would be by mere virtue of a certificate admissible in evidence, the court would have nothing before it save the certificate of the clerk at Ely certifying up to the *time* when he put the ballots out of his possession that the ballot box contained the will of the voters of White Pine County. From the *time* the ballot box would leave the county clerk of White Pine County, in whose care or custody would the ballots be until they arrived in Carson City and placed before this tribunal, before which the contest is being prosecuted? If the county clerk of White Pine County could turn them over to Wells-Fargo, he could turn them over to any corporation or person he saw fit, and send them by stage, horseback, or otherwise, as there is no statutory provision provided for the manner of sending them or for their care, if the law providing for their safekeeping, custody, and production before tribunals before which an election contest is pending is not to be considered and if the construction counsel for relator places upon the statute were allowed to prevail. After the ballots would arrive here, to admit them in evidence upon the certificate of the clerk as made in White Pine County would leave a gap of *time* and *space* wherein said ballots would be in the custody of another, expressly in conflict with section 1795, *supra*, and accordingly could not be admitted in evidence without a recertification of the county clerk that they were the same ballots to which he had formerly certified

Norcross, J., concurring

to in the city of Ely, after the proper foundation for their admission has been laid. That the legislature never intended that the custody and preservation of the ballots should be so lightly treated is apparent to any one reading the full intent and spirit of our election laws which must be read in connection with the statute in question. To hold otherwise, I believe, would do violence to every safeguard that has been so zealously and jealously thrown about the casting, care, preservation, and secret custody of the ballots, and place a construction on the statute in question not in consonance with our legislation affecting elections and election contests and not in harmony with the well-settled rule of construction that a general law will not repeal a special law, relating to a particular subject, by implication, where it is manifest that the legislature did not so intend.

The application for an order directing the county clerks of the various counties to certify to this court the various ballots and election returns of the several precincts is denied, for the reason that there is no provision for such an order to be made, and the further application of relator to offer in evidence any ballots which may arrive without being in the care and custody of the officer designated by law will be denied until a proper foundation is laid for the introduction of the same as prescribed by the rules of evidence and by law.

Let such be the orders.

NORCROSS, J., concurring:

I concur in the order denying the application of counsel for an order directing the county clerk of Storey County to certify to this court the ballots and other election returns of the several precincts of that county, for the reasons heretofore given and stated in the opinion of the chief justice.

I also concur in the order sustaining the objection of the offer of the ballot box and contents of one of the precincts of Lyon County, for the reasons stated in the opinion of the chief justice. I do not, however, concur

Norcross, J., concurring

in the views expressed in the opinion of the chief justice that ballots and other election returns may not under any circumstances be admitted in evidence upon the proper certificate of the county clerk. Had the offer of the Lyon County precinct been in proper form, I think the same would have been admissible.

The ballot box and its contents, together with the other election returns, of the Lyon County precinct were produced in court by the clerk of that county under regular subpoena.

[4] The language of the statute is plain and unambiguous, and there is no room for construction so far as its provisions are concerned. If ballots and other election returns are public documents, then, under proper conditions, they may be admitted in evidence if duly certified. That they are public documents, I think, is without question under the definition and authorities cited in the opinion of the chief justice.

The argument made by counsel for respondent to the effect that election returns ought not to be admitted in evidence upon the mere certificate of the clerk, and that it shifts the burden of proof, goes to the wisdom of the statute rather than to the force and effect—a matter with which the courts have nothing to do.

The contention of counsel for respondent, to the effect that a county clerk has no right to permit the ballots to be removed from his office and custody except upon a subpoena requiring them to be produced before the court in an election contest, and that for him to certify to the same and then to deliver them to some person or carrier to be brought into the court, under all circumstances, would be contrary to law and in violation of his duty as an officer, cannot, I think, be sustained.

I think it manifest from the provisions of section 1795, Rev. Laws, referred to in the opinion of the chief justice, especially in view of the many other provisions of law for safeguarding the purity of the ballot, that the legislature intended that the ballots should remain in the custody fixed by law, except when their removal was specifically

Norcross, J., concurring

authorized by some court, board, or body empowered to examine the same in case of an election contest. I also think it manifest that a clerk would not be authorized to certify to the same and, without a subpoena commanding their production or other authorization of the court, board, or body conducting the contest, proceed of his own volition, independent of such subpoena or authorization, to send them to such court, board, or body.

Under certain circumstances, I think a court conducting a contest would be justified in permitting election ballots and returns to be certified and forwarded under prescribed conditions securing their safety, without requiring the presence of the clerk under subpoena. For example, should both sides of a contest for a state office so stipulate, the fact that it was agreeable to the parties, taken in connection with the saving in expense to the litigants, might justify the court in permitting such procedure. Other situations might present themselves in which such a procedure would be appropriate. Even then, should a clerk refuse to transmit the ballots, resort would have to be had to the only lawful method of compelling their production by subpoena.

Where a clerk of a distant county is required to produce the ballots under subpoena, the usual and practically the only feasible method for him to bring them is to intrust them to the care of the express company. Most of the ballots introduced in this case have been so transported. As a clerk must resort to some safe agency to transport the election returns, I see no reason why a court may not prescribe such an agency as an arm of the court. Cases may arise in which there may be no objection to such procedure; convenience and the saving of great expense may commend it to all concerned.

In the present case there is strenuous objection to the production of the ballots except by the clerk personally. There does not appear to exist such a condition as, notwithstanding such objection, would warrant the court in permitting the production of the ballots in any other way.

Talbot, J., concurring

TALBOT, J., concurring:

I concur in the order as stated in the opinions of the chief justice and Justice NORCROSS.

Whether ballots be considered public documents or not, under the adverse contention of counsel, would seem to be immaterial, if effect be given to the language of section 1795. If it be admitted that they are public documents, and are admissible in evidence on the certificate of the legal keeper under section 5409 if he appears in court with them in a pending contest and they have been in proper custody until so presented as provided by statute, and I believe they are because they pertain to public elections and public offices, nevertheless, when they are not presented by the proper official custodian, the same presumptions regarding their validity, and that there has been no opportunity for interested persons to tamper with them, and for warranting their admission in evidence, do not prevail.

It is ordinarily requisite for the admission of ballots that it be shown that they have been kept in proper official custody. While they remain in the possession of the officers, as directed by law, it is presumed that the officers do their duty and that the ballots are properly preserved; but for apparent reasons the same presumptions do not attach when the ballots are given over to the possession of persons who are not under official oath or obligation, or who may have a direct or important interest in a contest for a public office depending upon the ballots. Although many contestants possess such a high degree of honor that they would not change the ballots if the custody were given over to them, other contestants might be so void of principle as to change enough ballots to turn the election in their favor if given the opportunity, which would result in allowing them to have the sole possession of the ballots before they are presented to the court as evidence. The law is not based on the theory that all men are honest, and since a time long prior to the adoption in this state of the Australian

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ballot system, providing for secrecy in the casting of ballots by electors, we have had statutes guarding in official custody the preservation and secrecy of the ballots after they were cast, and prohibiting their inspection or custody by persons whose claim to office depended upon the ballots, or by the public or individuals other than the official custodian or tribunal hearing the contest.

Section 1795 of the Revised Laws is section 29 of the general act relating to elections, and as originally passed in 1873 (Stats. 1873, c. 171) it had the same provision which is now in force: "That the ballots so deposited with the board of county commissioners shall not be subject to the inspection of any one except in case of contested elections, and then only by the judge, body or board before whom such election is being contested." This section as originally passed provided that the ballots and election returns should be directed to the clerk of the board of county commissioners. After an election contest for the office of county clerk, in which the election returns were overturned in favor of the incumbent by a recount of ballots which had been held in his custody, the legislature amended this section in 1879 (Stats. 1879, c. 112) by providing that if the clerk was voted for at the election the ballots and returns should be directed to certain other county officers in the order named in the statute, so that they would be deposited with an officer who was not a candidate and had no interest in the election resulting from the ballots.

It is, and long has been, the policy of the legislature to provide for the official custody of the ballots, as well as for their reception from the election officers by some county officer who is not interested as a candidate at the election. These statutory provisions were enacted to safeguard the ballots by requiring them to be in disinterested official custody and to avoid the dangers which might result from giving them over to the possession of other persons.

The rule is well settled that a later general law does not repeal an earlier special law relating to a particular sub-

Talbot, J., concurring

ject, and I do not believe that the legislature by passing section 5409, which provides that public documents may be admitted in evidence by the certificate of the legal keeper, had in mind or intended to repeal the clear provisions providing for the official and secret custody of ballots, nor that the provision that a public document may be admitted in evidence by the certificate of the legal keeper was intended to repeal the provisions of section 1795 for the official keeping and secrecy of ballots, nor to authorize them to be turned over to contestants or other persons when the statute is specific in directing their official and secret keeping, and nowhere provides that they shall be turned over to contestants or individuals other than the officers specially authorized to retain them.

Whether ballots be considered public documents or not, as the law provides for their official and secret custody, and there is no authorization for turning them over to the contestants, it would seem that they are not admissible under the mere certificate of the clerk when they have been out of his official custody for a period of time after he made and attached his certificate, or at least unless evidence is supplied that they are in the same condition when presented to the court that they were when they left the custody of the clerk; and high authorities hold that they are not admissible even if such evidence is furnished, unless possibly in cases where the irregularity in their official keeping is slight. Mr. McCrary, in his work on Elections (4th ed.) at sections 471, 473, and 475, says:

"Where, as is the case in several of the states, the statute provides a mode of preserving the identical ballots cast at an election, for the purpose of being used as evidence in case of contest, such statute, and particularly those provisions which provide for the safe-keeping of such ballots, must be followed with great care. The danger that the ballots may be tampered with after the count is made known, especially if the vote is very close, is so great that no opportunity for such tampering can be permitted. Such ballots, in order to be received in

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evidence, must have remained in the custody of the proper officers of the law from the time of the original official count until they are produced before the proper court or officer, and if it appear that they have been handled by unauthorized persons, or that they have been left in an exposed and improper place, they cannot be offered to overcome the official count. * * *

"So much depends upon the terms of the particular statute to be construed that it is impossible to lay down a general rule applicable to all cases; but the better opinion seems to be that, if the deviation from the statutory requirements relative to the manner of preserving the ballots has been such as necessarily to expose them to the public or unauthorized persons, the court should exclude them; but if the deviations have been slight, or of such a character as not necessarily to render doubtful the identity of the ballots, the question of their identity may well go to the jury to be determined upon all the evidence. * * *

"Before the ballots should be allowed in evidence to overturn the official count and return, it should appear *affirmatively* that they have been safely kept by the proper custodian of the law, that they have not been exposed to the public or handled by unauthorized persons, and that no opportunity has been given for tampering with them."

Although the law directs that the ballots be retained in the custody of the clerk, and he is not authorized to surrender them except upon subpoena or order of the judge, body, or board before whom the election is being contested, yet, if he does surrender them with his certificate, such certificate can only authenticate the ballots to the time that it is made, for it is impossible for the clerk to guarantee in advance by his certificate that the ballots will be in the same condition at some time in the future after they have been in the custody of other persons that they were when he surrendered them to others.

In view of these statutes, and the construction given by the courts to similar provisions relating to the secret

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official keeping of ballots, I conclude that if the ballot boxes and contents be considered as public documents, and they are offered in evidence with the certificate of the clerk from the custody of some person other than the legal keeper, they are not admissible on such certificate alone, even if admissible in certain cases if evidence of their correctness is supplied, but that they are admissible on such certificate alone if the clerk keeps them in his custody until he presents them to the court with his certificate.

[No. 1875]

THE RIVERSIDE FIXTURE COMPANY (A CORPORATION), RESPONDENT, v. G. W. QUIGLEY, HOTEL RENO (A CORPORATION), AND L. I. MCKISSICK AND L. L. MCKISSICK, APPELLANTS.

1. MECHANICS' LIENS—CLAIM FILED—SUFFICIENCY OF DESCRIPTION.

Though in a claim for lien filed the property on which the building stood for which materials were furnished was insufficiently described, where the rights of no third persons had intervened and the description was the same as that used by the owner in his lease to the present holder, it was sufficient to charge the premises with the lien.

2. PLEADING—AIDER BY ANSWER.

Though a complaint in an action to foreclose a material-man's lien did not properly describe the premises on which the lien was claimed, where the answer set up the true description which was agreed to by stipulation of the parties, it will be considered in aid of the complaint so as to support a judgment entered.

3. MECHANICS' LIENS—SUFFICIENCY OF CLAIM FILED—DESIGNATION OF OWNER.

Rev. Laws, 2217, provides that a lien claim shall recite the name of the owner or reputed owner, if known. Section 2215 provides that, if a person owns less than a fee simple estate, only his interest shall be subject to lien. Section 2221 provides that the interest of an owner of property, or one having an interest, may be subjected to a lien, where a building or improvement was constructed with his knowledge. A lien claim recited "that the above-mentioned 'L.' is the owner and reputed owner of said premises." The heirs of the former owner were minors, other than L., who assumed, not only to have an interest in the property, but to exercise control over the same. *Held*, the designation of such heir is sufficient to charge his interest for the entire lien.

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4. MECHANICS' LIENS—RIGHT TO HEIR'S INTEREST DURING ADMINISTRATION OF ESTATE.

The fact that an estate is in course of administration will not prevent a lien claimant from obtaining a valid lien against the interest of an heir, as the property vested in the heirs at law on the death of their ancestor.

5. MECHANICS' LIENS—SUFFICIENCY OF STATEMENT AS TO CONDITIONS AND TERMS OF CONTRACT.

A lien for materials and labor furnished which contains a general statement as to their nature and the time of furnishing, together with a general statement of the sum due, sufficiently states the "terms, time given, or conditions of the contract."

APPEAL from the Second Judicial District Court, Washoe County; *Peter Breen*, Judge, presiding.

Action by the Riverside Fixture Company against G. W. Quigley, L. L. McKissick, and another, to foreclose a lien for labor and materials. From a judgment for plaintiff, defendant L. L. McKissick appeals. **Affirmed.**

The facts sufficiently appear in the opinion.

Boyd & Salisbury, for Appellant:

The claimant herein, in its claim of lien, has bound itself to the property which it seeks to charge, and it cannot amend its claim of lien by proving in court, without any averments, or any allegations in its complaint to support it, any different property from that which it claims in its lien. (Black on Judgments, sec. 141.)

The claim of lien, as made, does not permit of evidence to identify the property, as the description is clear-cut, designating not only lots, but blocks also, and in this respect the lien would be sufficient, all other things being correct, to charge lots 1 and 2 with the lien.

There is no uncertainty nor ambiguity in the description; there is no lack of description; but it is simply a description of the wrong property. We think that point alone is sufficient to destroy plaintiff's claim of lien, as this court cannot direct a sale of lots 9 and 10 to satisfy a claim of lien upon lots 1 and 2. (Am. & Eng. Ency. Law, 2d ed., vol. 20, pp. 420, 421 and 422.)

Even had the plaintiff attempted in its complaint to

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set up the misdescription and seek the relief of a court of equity, the court could not correct the lien in that respect. Evans's addition to the town (now city) of Reno is now the common designation of all that property lying north of the plaza. It is further shown by the stipulation that lots 1 and 2 are owned by the McKissick estate, hence the claim of lien upon lots 1 and 2, when the work was done upon lots 9 and 10, is void. (*Willamette S. M. Co. v. Kremer*, 94 Cal. 205.) The variance is fatal.

The claim of lien is equally as objectionable on account of the fact that there is no "statement of the terms, time given or the condition of the contract." This is not a mere technicality; it is a matter of express substantive law and cannot be aided by any averments in the complaint; it, in fact, is the very basis of the lien, and unless it is set up on the claim of lien, and the showing made that the contract, statement and terms have been complied with by plaintiff, it cannot have a lien, hence, unless the terms, time given and condition of the contract are expressly set forth in the lien, the court cannot determine on the hearing that the plaintiff has fully complied with its contract.

The old rule of letter strictness, in regard to the enforcement of a mechanic's lien, has been done away with, and we think properly so, the rule of law now being that a substantial compliance with the statute is sufficient, but the phrase "substantial compliance" does not mean a disregard of the statute.

The statute in its requirements must be strictly followed when you seek to charge the property of third persons under the contract with a tenant in possession, and over which the owner has no control or voice. If it is not substantially set out, then the claimant acquires no lien and no right to appropriate the property of the defendant in this action, to satisfy the debt incurred by a third person. (Phillips on Mechanics' Liens, sec. 18, pp. 345-349.)

There is nothing in the claim of lien to show that the plaintiff was to furnish the necessary wiring, the neces-

Argument for Respondents

sary fixtures, and perform the necessary labor in installing the same, and was to be paid the retail price of said articles and the regular price for labor in installing and doing the work necessary. This is precisely what was meant by the court in the case of *Porteous v. Fee*, 29 Nev. 375.

The lien fails to give the name of the owner of the property. The giving of the name of one of the owners is not sufficient. The ownership of the property was a matter of public record and all persons are charged with a constructive notice of who are the owners of the property. (Rev. Laws, 1039.)

The claim of lien must state correctly the name of the owner or reputed owner, and the findings must follow such claim. Here, then, is the assertion that someone else is the owner, and that L. L. McKissick has an interest in the estate that owns the property. The defect is fatal to the entire claim of lien. (Phillips on Mechanics' Liens, sec. 345; Am. & Eng. Ency. Law, vol. 20, pp. 422-424; *Malter v. Falcon M. Co.*, 18 Nev. 209.)

Huskey & Springer, for Respondents:

A substantial compliance with the statute is sufficient. (*Maynard v. Ivy*, 21 Nev. 245.)

The notice of lien contained a reasonably exact statement of the terms and conditions of the contract. The failure to deny admitted that the contract between the parties was as set forth in the notice of lien and in the complaint. (*Smith v. Lee*, 10 Nev. 208.)

The notice of lien contained a sufficient description of the property, especially so as the action is between the original parties. (*Irving v. Cunningham*, 4 Pac. 766; *Hunter v. Truckee Lodge*, 14 Nev. 30; *Harrisburg L. Co. v. Washburn*, 44 Pac. 392; *Kezartee v. Marks*, 16 Pac. 411; *Hotaling v. Cronise*, 2 Cal. 60; *Tibbetts v. Moore*, 23 Cal. 209; *McHugh v. Slack*, 39 Pac. 674; *National Lumber Co. v. Bowman*, 77 Iowa, 706; *Brown v. Coke Co.*, 16 Wis. 578; *Scholes v. Hughes*, 77 Tex. 482; *Strawn v. Cogswell*, 20 Ill.

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457; 13 Cyc. 550; 20 Am. & Eng. Ency. Law, 418, 421; 27 Cyc. 157, 159.)

Plaintiff's notice of lien set forth that defendant L. L. McKissick was the owner, or reputed owner, of the premises. The record shows both that she was owner and reputed owner. The ownership vested upon the death of B. H. McKissick. (*Gossage v. Crown Point M. Co.*, 14 Nev. 153; *Santa Cruz R. Co. v. Lyons*, 65 Pac. 331; *Corbett v. Chambers*, 41 Pac. 875; *McPhee v. Litchfield*, 145 Mass. 565; 1 Am. St. Rep. 482.)

The answer and the stipulation as to the facts of the case supplied any defect there might have been in the complaint.

Per Curiam:

This is an action to foreclose a lien for labor and material. From a judgment in favor of the plaintiff and from an order denying a motion for a new trial the defendant L. L. McKissick appeals.

The plaintiff furnished and installed certain electrical fixtures in a building known as the Hotel Reno. The value of the labor and material so furnished was alleged to be \$1,278.77, and credits amounting to \$460.24 were acknowledged, leaving a balance alleged to be due of \$818.53. From the lien filed and sought to be foreclosed we quote the following, relative to the description of the property: "That the following is a description of the premises and property upon which said work was done and materials furnished, and herein asked to be charged with this lien, to wit: Lots one (1) and two (2), in block 'G' of Evans addition to the town, now city, of Reno, together with the building and improvements thereon, known as and called 'Hotel Reno.'"

The complaint in the action alleged the further description that the property was situated "at the corner of Sierra and Plaza Streets."

The answer, among other allegations, contained the following relative to the description of the property in ques-

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tion: "That all of the property known as the Hotel Reno, situate in the city of Reno, county of Washoe, State of Nevada, and sought to be charged with the lien described in plaintiff's complaint, is situated on lots nine (9) and ten (10) block 'G' of the original plat of the town (now city) of Reno; that all of said property is owned, managed, and controlled by the estate of B. H. McKissick, deceased."

The judgment entered in the action contained the following provision: "It is hereby ordered, adjudged and decreed: That the plaintiff, the Riverside Fixture Company, a corporation, have, and that it is entitled to have, a lien upon the following-described building and lots on which it stands, to the full extent of the interest owned in said property by said defendant, L. L. McKissick: The Hotel Reno on the corner of Plaza and Sierra Streets, city of Reno, county of Washoe, State of Nevada, and lots nine (9) and ten (10) in block 'G' of the original town site, or plat, of the town (now city) of Reno, Washoe County, Nevada, on which said building stands; for the sum of eight hundred eighteen dollars and fifty-three cents (\$818.53) and for costs of this action."

In accordance with a stipulation entered into on the trial, the facts of the case, other than as to the corporate character of the parties, were found by the court as follows:

"(3) That at all of the times mentioned in plaintiff's amended complaint the estate of B. H. McKissick, deceased, was, and still is, the owner of lots one (1), two (2), nine (9), and ten (10), in block 'G' of the town site (now city) of Reno. That the said estate of B. H. McKissick, deceased, is now being administered in the Second judicial district court of the State of Nevada in and for the county of Washoe. That the defendant L. L. McKissick was at all of the times mentioned in the amended complaint, and still is, the duly appointed, qualified, and acting administratrix of the estate of B. H. McKissick, deceased. That the work for which plaintiff seeks to foreclose its lien was performed and done upon

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the building at present known as the Hotel McKissick on the corner of Plaza and Sierra Streets, and situated upon lots nine (9) and ten (10) of block 'G' of the original town site, now city, of Reno. That B. H. McKissick, deceased, died intestate, and that the defendant, L. L. McKissick (his widow) and two minor children are the only heirs of his estate.

"(4) That the defendant G. W. Quigley occupied said premises at the times mentioned in plaintiff's amended complaint under and by virtue of a lease executed by defendant L. L. McKissick to said Quigley in her own name, not as administratrix of said estate, and without first obtaining permission or authority of the court in which said estate is being administered upon to execute said lease.

"(5) That commencing on the 1st day of June, 1908, and ending on the 1st day of August, 1908, with the full knowledge of the defendant L. L. McKissick, the plaintiff did, at the special instance and request of the defendant G. W. Quigley, and not upon express contract, furnish the material and labor for wiring the building and installing electric fixtures, and did wire the building and install electric fixtures in and upon the above-described Hotel Reno and premises, and that said wiring, materials, and fixtures are now a part of said Hotel Reno, and that the balance now due and owing to said plaintiff for the same over and above all just payments and set-offs is \$818.53.

"(6) That no definite time was arranged for between plaintiff and defendant G. W. Quigley, or with any other person, for the payment of the said balance of \$818.53, and that the same was due and owing to said plaintiff upon the completion of said work.

"(7) That upon the 24th day of September, 1908, and within 50 days from the time of the completion of said work, the plaintiff filed its claim of lien for the money due it under and in accordance with the laws of the State of Nevada with the county recorder of the county of Washoe, State of Nevada, and that said claim of lien was duly verified according to law.

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"(8) That in said claim of lien the said property was described as follows: 'Lots one (1) and two (2), in block "G" of Evans addition to the town, now city, of Reno, together with the building and improvements thereon, known as and called "Hotel Reno."'

"(9) That there is no Evans addition to Reno, Nevada, but that there is an Evans North addition to Reno, Nevada. That there is no block 'G' in Evans addition or in Evans North addition to Reno, Nevada. That there is only one Hotel Reno in Reno, Nevada. That the estate of B. H. McKissick in which defendant L. L. McKissick owns an interest owns only one building known as and called 'Hotel Reno.'

"(10) That the defendant L. L. McKissick's said lease to the defendant G. W. Quigley of said Hotel Reno and premises is, and was at the time of filing said claim of lien, of record in the office of the county recorder of Washoe County, Nevada, and that the description of said property in said lease so executed by said defendant L. L. McKissick is exactly the same as that used by plaintiff in its said claim of lien.

"(11) That defendant L. L. McKissick had actual notice of the said labor and improvements during the time they were being placed upon said premises, but that she gave no notice, and made no objection to the same.

"(12) That this action to foreclose said lien was commenced by filing this complaint and serving the summons on the 17th day of December, 1908, and within six months from the filing of said claim of lien."

[1] Appellant contends that the error in the description of the property sought to be charged with the lien is fatal to respondent's right of recovery. In considering this question it should be borne in mind that no rights of third parties have intervened from the time the labor and material was furnished to the time of the trial and judgment. A more liberal rule is indulged in when the controversy is between the owner and the lien claimant than is applied when it is between the lien claimant and third parties. "A description may be suf-

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ficient against the owner though it would be insufficient as against other persons." (20 Am. & Eng. Ency. 421.) The lien claimant followed the description which the appellant had used in the lease to the defendant Quigley. Therefore it can hardly be contended that the appellant herself could have been misled by it. The property was described as the "Hotel Reno," and there was only one piece of property in the city of that description. There were no lots in the city that conformed to the description used in the lease and lien, so that there was less liability for that portion of the description to mislead than otherwise would have been the case. The authorities, we think, amply support the proposition that the description given in the lien is not so defective as to warrant the court in refusing to enforce it.

"The courts have been liberal in upholding imperfect descriptions, and are very reluctant to set aside a lien merely for looseness of description. But the description must be sufficiently certain to identify the property sought to be charged, and, if it does this, it is sufficient to support the lien." (20 Am. & Eng. Ency. 418.)

"The same fullness and precision of description is not required in a lien statement as in the case of a conveyance or a judgment, and the courts are reluctant to set aside a mechanic's lien merely because of a loose description of the property, as the statutes generally contemplate that the claimants should prepare their own papers. As a rule, any description which will enable one familiar with the locality to identify the property upon which the lien is intended to be claimed with reasonable certainty is sufficient." (27 Cyc. 157.)

"The description, to be sufficient, must be such as, aided by extrinsic evidence suggested by the description itself, would charge a party dealing with real estate with notice of such claim for lien. The fact that no other property answers the description in the notice will aid what might otherwise be an insufficient description." (Id. 159.)

"A reference in the description to a building on the property may serve as an aid to the identification of land

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not clearly described. It is not necessary to state the name of the building; but, where the building has a well-known name which distinguished it from all other buildings in the locality, the use of such name in the description may of itself serve as a sufficient identification of the property." (Id. 163.)

In *Hunter v. Truckee Lodge*, 14 Nev. 30, the premises were described as lot 9 of a certain block, when as a matter of fact they should have been described as a fractional part of lot 10 of said block. But reference was also made to the building of defendant situated on said lot, and it was proved that defendant had but one building on the block which was well known. It was held that the reference to the building sufficiently identified the premises.

In *Harrisburg Lumber Co. v. Washburn*, 29 Or. 150, 44 Pac. 392, the notice of lien stated that materials were furnished for erecting a church building on lots 1, 2, and the S½ of lot 3, in block 1, in T. A. William's addition to Junction City, for the Methodist Episcopal church of that place, and a lien was claimed "on said building and the premises above described." As a matter of fact, the premises were in block 2 (not block 1) of Milliron's addition (not T. A. William's addition). The evidence showing that there was but one Methodist Episcopal church in Junction City, the court held the description sufficient, saying: "There can be no doubt that the property can be identified by every person acquainted with the locality by the simple designation remaining in the notice after excluding the false description."

In *Kezartee v. Marks*, 15 Or. 536, 16 Pac. 411, the court said: "In determining this question (*i. e.*, the sufficiency of a description in a notice of lien), it must be remembered that there are no subsequent purchasers or lienholders to be affected. Every interest remains just as it was at the time the liens attached. No doubt a somewhat stricter rule would have to be applied in case there were junior incumbrancers or subsequent purchasers. (*De Witt v. Smith*, 63 Mo. 263). The general rule as to what shall be a sufficient description to sustain a mechan-

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ic's lien seems now to be that, if there appears enough in the description to enable a party familiar with the locality to identify the premises sought to be described with reasonable certainty, it will be sufficient."

In *Hotaling v. Cronise*, 2 Cal. 60, the property was described as "the wharf on Battery Street, between Jackson and Pacific Streets in San Francisco." There was no showing as to how many wharfs there were in said locality, or as to how many wharfs defendant owned in said locality. The description was held sufficient.

In *Tibbetts v. Moore*, 23 Cal. 209, the property was described as a "quartz mill, being at or near the town of Scottsville, in Amador County, known as 'Moore's new quartz mill.'" The point was raised that there was no evidence tending to show that the premises were in fact known by the designation given. The court said: "There was no evidence that there was any other quartz mill at that place so designated as to render it uncertain which was intended. The description we deem sufficient to identify the property and uphold the lien." In other words, the court placed the burden of proof upon the defendant to show that the premises were not usually and well known as described in the lien.

In *McHugh v. Slack*, 11 Wash. 370, 39 Pac. 674, it was held that a description of property as a certain brick building, situated on certain lots in block 670 of the E. Co.'s addition to the city of E., which building is known as the "S. building" and fronts on H. Avenue, in said city, and giving its dimensions, sufficiently described the property, though it is not in such addition.

See, also, *Shaffer v. Hull*, 2 Clark (Pa.) 93; *National Lumber Co. v. Bowman*, 77 Iowa, 706, 42 N. W. 557; *Holland v. Garland*, 13 Phila. (Pa.) 544; *Brown v. Coke Co.*, 16 Wis. 555; *Scholes v. Hughes*, 77 Tex. 482, 14 S. W. 148; *Strawn v. Cogswell*, 28 Ill. 457; *Springer v. Keyser*, 6 Whart. (Pa.) 187.

[2] It is further contended that, no averments having been made in the complaint setting forth the error in the description and reciting the correct description, there is

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nothing upon which the judgment ordering the sale of the premises under the true description may rest. In addition to the description contained in the lien, the complaint alleged it as being "that certain building and premises at the corner of Sierra and Plaza Streets." The judgment also recites this latter description. The answer set up the true description, and counsel entered into a stipulation as to the same. The answer, setting up the true description which was agreed to by the parties, has the effect of supplying the omission in the complaint, and may be considered in aid thereof.

[3] The lien recited "that the above-mentioned L. L. McKissick is the owner and reputed owner of said premises." It is contended that this is not a sufficient designation of the owner. The statute requires that the lien claim shall recite "the name of the owner or reputed owner if known." (Rev. Laws, 2217.) By section 2215 of Rev. Laws it is provided: "But if such person owned less than a fee simple estate in such land, then only his interest therein is subject to such lien." Rev. Laws, 2221, reads: "Every building or other improvement mentioned in section 1 of this act, constructed upon any lands with the knowledge of the owner or the person having or claiming any interest therein, shall be held to have been constructed at the instance of such owner or person having or claiming any interest therein, and the interest owned or claimed shall be subject to any lien filed in accordance with the provisions of this chapter."

[4] Upon the death of B. H. McKissick, the property vested in his heirs at law. (*Winters v. Winters*, 34 Nev. 323; *Gossage v. Mining Co.*, 14 Nev. 153.) The appellant had a one-third interest in the property as an heir of the said B. H. McKissick. The other heirs were minors, and it is not claimed that their interests were or could have been affected under the facts as shown in this case. The fact that the estate of B. H. McKissick was in course of administration did not prevent the respondent obtaining a valid lien in so far as the interests of the appellant

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in the property were concerned. That interest vested upon the death of B. H. McKissick, subject only to the latter's debts and the expense of administration. The appellant, not only had an interest in the property, but assumed to exercise control over the same. The fact that the other owners in the property were minors and by reason thereof could not be bound is no reason why the appellant should not alone be held subject to the lien. If the property was really benefited by the improvements placed upon the property, it may be that the court in the matter of the minors' estates might relieve appellant from a portion of the burden, but, so far as this case is concerned, appellant's interest is liable for the whole.

[5] It is further contended that the lien is fatally defective, in that it does not contain a "statement of the terms, time given or the conditions of the contract," as required by the statute. The lien provides: "That commencing on June 1st, 1908, and ending on August 27th, 1908, the said the Riverside Fixture Company did, at the special instance and request of said G. W. Quigley, furnish the material and labor for wiring, and installing electric fixtures, and did wire and install electrical fixtures, and in that certain building, in Reno, Nevada, known as and called the 'Hotel Reno' situate upon the premises hereinafter described and sought to be charged with this lien. That said materials, fixtures, and labor so furnished were actually used, placed, and done upon said premises, and that they were, and are, reasonably worth the sum of \$1,278.77. That no part of said sum of \$1,278.77 has been paid to said the Riverside Fixture Company, except the sum of \$158.84. That no time was given for the payment for said materials and labor so furnished, and that the reasonable value for the same was due and payable upon the completion and installment of said work, and, that deducting all just credits and offsets, the sum of one thousand one hundred nineteen dollars and ninety-three cents (\$1,119.93) is now due and owing to the said the Riverside Fixture Company, a corporation, for said materials and labor."

Argument for Petitioners

We think the lien is sufficient in the respect mentioned, and that the statement contained is amply supported by the proofs. The objection to the sufficiency of the lien in the respect last mentioned is, we think, answered by the case of *Lonkey v. Wells*, 16 Nev. 271.

The judgment is affirmed.

[No. 1980]

STATE OF NEVADA, EX REL. OSCAR J. SMITH
AND W. E. GRIFFIN, PETITIONERS, *v.* SECOND
JUDICIAL DISTRICT COURT AND THOMAS F.
MORAN, DISTRICT JUDGE, RESPONDENT.

1. HABEAS CORPUS—PROHIBITION—DISMISSAL OF PROCEEDINGS.

Though a *habeas corpus* proceeding is civil in nature, and civil actions are subject to voluntary dismissal, and petitioner for a writ of *habeas corpus* can dismiss the controversy, he cannot dismiss the proceeding without an order of the court in which the proceeding is pending in regard to their custody or bail.

ORIGINAL PROCEEDING for writ of prohibition. **Writ denied.** Temporary order vacated.

Glynn & Smith, for Petitioners:

A writ of *habeas corpus* issued by an appellate court operates as *supersedeas*. (15 Am. & Eng. Ency. Law, 133; Bacon's Abr., vol. 9, 283-284; *Osborn v. Davis*, 60 Kan. 695; 9 Ency. Pl. & Pr. 1029-30.)

The question of supervisory control has been elaborately discussed in the notes to 51 L. R. A. 33 and 20 L. R. A., N. S. 942; from which it appears that many of the states have constitutional or statutory provisions for the exercise of this authority of supreme over inferior tribunals, while in other states no such direct authority exists, but the authority has been exercised, or held to be inherent, in all of them where the question has fairly arisen.

The authority was inherent in the Court of King's Bench and comes to us with and from the common law.

A plaintiff in a legal proceeding is entitled to control the disposition of his cause where he acts reasonably and

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upon payment of costs. (6 Ency. Pl. & Pr. 833; Rev. Laws, 5237.)

Under a statute identical with our own, the Supreme Court of Idaho, in *Boyd v. Steele*, 6 Idaho, 633, 59 Pac. 21, says: "The plaintiff in such a case is entitled to a dismissal upon payment of costs and filing his dismissal with the clerk." (*Pugsley v. C. R. I. & P. Ry. Co.*, 77 Pac. 579; *Miller v. Northern Pacific Ry. Co.*, 76 Pac. 692.)

A *habeas corpus* proceeding is an action. This subject is ably discussed in the case of *State, ex rel. Newell, v. Newell*, (Mont.) 34 Pac. 28, 29, citing *Weston v. City Council*, 2 Pet. 449; *Cohens v. Virginia*, 6 Wheat. 264; *Holmes v. Jennison*, 14 Pet. 540.

The whole question of *habeas corpus*, the origin and history of the writ, and the scope of the inquiry, is ably discussed in the following cases: *Simmons v. Georgia Iron and Coal Co.*, (Ga.) 43 S. E. 780; *In re Patzwald*, (Okl.) 50 Pac. 139.

The interest of the state in the *habeas corpus* proceedings in the district court was to have the petitioners, Smith and Griffin, remanded to the custody of the sheriff of Eureka County. By dismissing their petitions the petitioners remanded themselves to the sheriff, and the state has no cause of complaint. It matters not to the state whether petitioners remanded themselves or were remanded by order of the district court. All that the state demanded, or could demand, was accomplished by the dismissals of the *habeas corpus* petition in the district court.

Cleveland H. Baker, Attorney-General, *Thomas J. McParlin*, District Attorney of Eureka County, *Lewers & Henderson*, and *Mack, Green, Brown & Heer*, for Respondent.

Per Curiam:

The petitioners were arrested in Washoe County by the sheriff of Eureka County, under warrants from the justice of the peace at Eureka, charging the commission of

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felonies in Eureka County. They applied to District Judge Moran, Washoe County, for writs of *habeas corpus*, and by him were admitted to bail pending the determination of their applications. Later, and before any final decision had been rendered by the district judge, they filed with the clerk of the district court purported dismissals of their petitions for writs of *habeas corpus*, and under an order of their bail for their arrest surrendered themselves to the bailiff of the supreme court and applied for writs of *habeas corpus* before this tribunal, obtained here an alternative order temporarily restraining the district court from deciding the cases brought before it and sought or claimed to be dismissed, which order they have asked to have made permanent.

The questions involved in the applications for writs of *habeas corpus* before the district judge, and additional questions, were involved in the applications for writs of *habeas corpus* in this court, and these questions we have determined in an opinion filed this day in the Eureka County Bank *habeas corpus* cases, on the applications of these petitioners and others, and in which cases we have ordered the petitioners discharged.

For the petitioners in this proceeding, it is claimed that the purported dismissals filed by them in the district court on their arrest and detention by the bailiff of the supreme court under the order of their bail operated to place them under arrest by virtue of the original arrest made in Washoe County by the sheriff of Eureka County under the warrants issued by the justice of the peace. It is contended that by filing the dismissals the cases before respondent were in fact dismissed, and that he was thereby deprived of jurisdiction to decide them, because a *habeas corpus* proceeding is similar to or is in effect a civil proceeding, and the statute in regard to civil practice provides for the dismissal of a case by the plaintiff at any time before a counterclaim is filed.

Although *habeas corpus* proceedings, except matters relating to penalties, which are treated as being of a criminal nature, are often classed as being in the nature

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of civil actions instead of criminal actions, and although it may be conceded that courts will not hear or determine a matter which is not really in controversy between the parties, and if it be conceded that petitioners could effectually dismiss the *habeas corpus* proceedings before the respondent, in so far as any controversy was concerned regarding the right of their discharge under the writs, it would still be necessary for some action to be taken, further than the filing of the dismissals by them.

If they had remained in custody pending the hearing and decision of the writs of *habeas corpus* before the respondent had filed dismissals, it might be considered that there would be nothing left to determine, and it could better be claimed that by filing the dismissals they had actually dismissed the writs or proceedings; for they would be in custody and in the same position they were before the writs were issued. But, as they were released by the respondent pending the hearing and determination of the writs, and the bond requiring them to abide the further order of the court, it would seem to be necessary for them either to surrender themselves into the custody of the officer in whose charge they were at the time the writs of *habeas corpus* were first issued by the respondent, or show that they had been taken into custody by some other officer, in such a way as would avoid the necessity for such surrender, so that the respondent could make the proper order relating to their custody and the exoneration of their bail.

They could not by merely filing dismissals take advantage of the release from custody which they had obtained by the order of the district court admitting them to bail until the further order of the court, without giving the court an opportunity to determine whether they were entitled to have the cases dismissed, and to make a further order in regard to their custody or bail, notwithstanding they could dismiss as to or withdraw the proceeding, so far as it related to the controversy which they had raised in reference to the right of the officer to hold them under the warrants.

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It is said that this court has a superintending control over the district courts, under which it may direct the action of the district court, and that under *Ex Parte Pettit*, 84 Kan. 637, 114 Pac. 1071, decided last year in Kansas, and under other cases, "the grant of original jurisdiction to the supreme court in *quo warranto*, *mandamus*, and *habeas corpus* comprehends and carries with it authority to exercise superintending control over inferior courts to the extent that it may be exerted by those writs and proceedings."

We do not deem it necessary to determine, at least at this time, whether this court will exercise such a superintending control; for, under our conclusion that the petitioners could only dismiss the controversy before the district court, and could not dismiss themselves without surrendering themselves to custody, or making a showing before the district court which would relieve them from the necessity of making such surrender, and thereupon obtaining an order of dismissal by the district court, the district court was not in error in concluding that the proceedings had not been dismissed. A number of cases regarding superintending control are considered and annotated in *State, ex rel. McGovern, v. Williams*, 136 Wis. 1, 116 N. W. 225, 20 L. R. A. (N. S.) 942-955.

The petitioners are at liberty to apply to the district court for an order for their discharge and for an exoneration of their bail, on the ground that the questions involved in the writs before the district court have been finally determined by this court favorably to the petitioners; and if such discharge is not considered favorably or granted them by the district court they may again petition this court and present for determination the question they have raised as to whether this court will exercise superintending control over the action or order of the district court in a *habeas corpus* proceeding.

We have often refused to issue writs commanding action by the district court until after the controlling questions have been presented and an opportunity given to the district court to pass upon them.

Points decided

Petition for the writ is denied, and the temporary restraining order is vacated.

[No. 2039]

STATE OF NEVADA, EX REL. GEORGE SPRINGMEYER, RELATOR, v. GEORGE BRODIGAN, AS SECRETARY OF STATE, RESPONDENT.

1. ELECTIONS—PRIMARY ELECTIONS—INDEPENDENT NOMINATIONS—PARTY DESIGNATION.

Under Rev. Laws, 1737, providing for the nomination of candidates for public offices by direct vote or by nominating petitions, and sections 1835, 1836, providing that nominations made by any convention shall be certified by a certificate containing the name of each person nominated, and the designation of the party or principle which the convention represents, and providing that a certificate of nomination shall contain the name of the candidate to be nominated with the other information required in the certificate of nominating conventions, the names of candidates nominated by petition are entitled to go on the official ballot with the designation of the party named in the certificate of nomination, and where a certificate of nomination for state offices, United States senator, representative in Congress, and presidential electors designates the candidates as the nominees of the Progressive party, the secretary of state may not certify the candidates as independent, but must certify them as candidates of the Progressive party.

SWEENEY, C. J., dissenting.

ORIGINAL PROCEEDING for writ of prohibition by the State, on the relation of George Springmeyer, against George Brodigan, Secretary of State, to prohibit respondent from certifying to the county clerks the name of relator and other candidates for public office as independent candidates. **Granted.**

The facts sufficiently appear in the opinion.

Sardis Summerfield and *George Springmeyer*, for Relator.

Cleveland H. Baker, Attorney-General, for Respondent.

By the Court, NORCROSS, J. :

This is an original proceeding in prohibition, in which an order is prayed for prohibiting the respondent, as secretary of state, from certifying to the several county clerks the name of relator and certain other candidates for public office as "Independent" candidates. The petition in this proceeding recites that on the 18th day of September, 1912, a certificate of nomination, signed by more than ten per cent of all the qualified electors in the state as shown by the last preceding general election, was filed with the secretary of state, in which certificate candidates for all state offices to be filled at the general election to be held in November, 1912, including candidates for presidential electors, United States senator, and representative in Congress, were regularly nominated, the said certificate of nomination further designating said candidates as the nominees of the Progressive party, which had for its candidate for president of the United States Theodore Roosevelt, and for vice-president Hiram W. Johnson. The petition further alleges that at the time of filing said certificate of nomination demand was made of the respondent that he certify all said candidates as nominees of the Progressive party, but that subsequently relator was informed in writing by the respondent that he, respondent, on the advice of the attorney-general, would certify all said nominees as "Independent," and under no other designation. The proceeding is of a friendly character, for the purpose of having an authoritative construction of certain provisions of the election laws relating to primary and general elections.

Section 2 of the act known as the "Primary Election Law," adopted by the legislature of 1909, provides: "All candidates for elective public offices shall be nominated as follows: (1) By direct vote at primary elections held in accordance with the provisions of this act; or (2) by nominating petitions signed and filed as provided by existing laws. Party candidates for the office of United States senator shall be nominated in the manner pro-

vided herein for the nomination of candidates for state officers." (Rev. Laws, 1737.) Sections 3 and 4 of "An act relating to elections and to more fully secure the secrecy of the ballot," adopted in 1891 (Rev. Laws, 1835, 1836), provide:

"SEC. 3. All nominations made by any such convention shall be certified as follows: The certificate of nomination, which must be in writing, shall contain the name of each person nominated, his residence and the office for which he is nominated, and shall designate the party or principle which such convention represents. * * *

"SEC. 4. A candidate for public office may be nominated otherwise than by a convention in the manner following: A certificate of nomination containing the name of the candidate to be nominated, with the other information required to be given in the certificate provided for in section 3 of this act, shall be signed by electors residing within the district or political division for which candidates are to be presented equal in number to at least ten per cent of the entire vote cast at the last preceding election in the state. * * *"

It is the contention of counsel for relator that, under the plain provisions of the two sections last above quoted, a certificate of nomination made by electors, otherwise than by convention, must designate the party or principle which the candidates so nominated represent, and that it follows as a duty upon the part of respondent to certify the candidates named in the petition, together with the party designation stated in the said certificate. Upon the contrary, it is the contention of the attorney-general that candidates of a political party cannot be nominated otherwise than by primary election; that the "party or principle" required to be designated in the certificate mentioned in section 3, *supra*, was applicable only to nominations made by conventions under the law as it existed prior to the adoption of the primary election law. The primary election law did not change the existing provisions relative to nominations of candidates by certificates signed by a prescribed number of electors, but specif-

ically provided that they should be continued in force. By section 4, *supra* (Rev. Laws, 1836), it is provided that the certificate shall contain "the name of the candidate to be nominated, *with the other information required to be given in the certificate provided for in section 3 of this act.*" What, then, is the other information required to be given in the certificate provided for in section 3? A certificate under the provisions of section 3 was required to contain, in addition to the name of the candidate, his residence, the office for which he was nominated, the "party or principle" which the convention represented. It must be conceded that the "party or principle" is information that was required to be given in the certificate made by the convention officers under the provisions of section 3, *supra*.

It is argued, however, that these words are limited by the other words used in their connection, "which the convention represents"; that, therefore, they are applicable only in cases where the certificate was made by convention officers and inapplicable where the certificate is made by electors. This construction places a limitation on the word "information" used in section 4, *supra*, and the point involved here might be resolved into the question: Did the legislature intend to exclude the designation of a party or principle in certificates made by electors? The language used may not be as clear as could be wished in statutes of this kind, and it may be somewhat ambiguous, but considering the act, generally known as the "Australian Ballot Law," as a whole, of which law the sections in question are a part, we think it was the intention of the legislature to require that the certificate made by electors shall contain all the information required in a certificate made by convention officers, including that of the designation of the party or principle which the candidate or candidates nominated by electors stand for. This we think is the spirit, if not the letter, of the law as it is written. Under the old party convention system, the party or principle was represented in the party name, and the statutes of some of the states which have adopted the Australian

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ballot law do not refer to the party name or principle in stating what the certificate shall contain in the case of nominations made by a party convention, but specifically mention such requirement in cases of nomination certificates made by electors. Such is the case in the Minnesota statute, a case construing which will hereafter be referred to.

Where a doubt may exist as to the proper construction to be placed on a constitutional or statutory provision, courts will give weight to the construction placed thereon by other coordinate branches of government and by officers whose duty it is to execute its provisions. (*State v. Glenn*, 18 Nev. 34; *State v. Grey*, 21 Nev. 378, 19 L. R. A. 134.) Since the adoption of the Australian ballot law in this state, during the past twenty years, six different parties have at different times secured a place on the official ballot under party designation by means of electors' petitions, to wit: Silver, People's, Socialist, Prohibition, Stalwart Silver, and Independence League. If the construction contended for by the attorney-general is correct, these several parties should not have been designated otherwise than as "Independent." If this construction is correct, we are unable to see how any party coming into existence after the adoption of the Australian ballot law could ever get upon the ballot under its proper designation. In the absence of language permitting of no other construction, we ought not to impute to the legislature an intention to prevent the electors of the state who have organized a new party from having candidates representing that party from appearing on the ballot. We think the whole policy of our election laws has been to recognize the right of electors to form new political parties and to have candidates appear upon the official ballot at general elections under such party designations. Ten legislative sessions have come and gone since the secretary of state first certified candidates nominated by electors' petitions under party designations, and no change in the law has ever been made.

The primary election law of 1909 did not attempt to

change this feature of the old law. Nothing in *Riter v. Douglass*, 32 Nev. 400, is in conflict with the views here expressed. In that case we said: "The primary law expressly preserves the existing law wherein independent candidates and parties who may not be able to qualify or avail themselves of the primary law may get on the official ballot by independent action."

The point involved here was not involved in the *Riter* case, but that case recognized the right of a party to get on the ballot by "independent action"; that is, independent of the primary law by petition. The word "Independent" after the name of a candidate on the official ballot may represent a party or principle, and it was so held in the case of *Quealy v. Warweg*, 106 Minn. 145, 118 N. W. 673, decided in 1908, under a statute substantially like ours. In that case the court said: "The election law (section 214; R. L. 1905), so far as here involved, requires that the certificate of nomination, which may consist of one or more writings, shall contain the name of the person nominated, the office for which he is nominated, and the party or political principle he represents, expressed in not more than three words. It has been previously held that a petition (certificate) which wholly fails to set forth any party or political principle which the candidate represents is void, because the statute is mandatory, and must be complied with in every essential respect. (*State v. Grift*, 106 Minn. 29, 117 N. W. 921.) That case did not involve the propriety of any attempted statement of a party or political principle represented. The question is a new one in this state. The statute must be liberally construed so as to effectuate legislative intention, and to fully secure to the people their right to express their choice. A technical construction of the language used would be objectionable on general principles, and tend to subvert the purposes sought to be attained. That purpose was evidently to secure a designation of a party or political principle which would be sufficient *inter alia* to prevent the candidate from unfairly posing to one person as of his party and to other persons as of their respective parties.

All that the statute requires in this regard is a declaration of political principle. Independence in politics is a familiar and recognized principle. Accordingly, when the present candidate used the term 'Independent party,' he was within the spirit of the law. It is not material whether that designation be regarded as describing the 'party,' or whether the word 'party' be regarded as merely surplusage. An appropriate emblem was used. See *Schafer v. Whipple*, 25 Colo. 400, 55 Pac. 180."

If "Independent" sufficiently designates a political principle under the statute, as decided by the Minnesota court, and we think it does, then manifestly it would not appropriately designate candidates who represented defined principles such as those now being expounded by the Democratic, Republican, Socialist, Progressive, Prohibitionist, or other existing parties. One purpose, if not the only, the main purpose, in having some designation after the name of a candidate upon the official ballot, is to give information to the voter of the party or principle for which the candidate stands. The purpose and intent of the law is to give the voter this information, and the law should be construed accordingly, and not as contended, in a way that would be manifestly misleading. The views herein expressed are also supported by the case of *Schafer v. Whipple*, 25 Colo. 401, 55 Pac. 180. It is clear from the provisions of the primary election law of 1909 that it has only reference to existing parties appearing upon the official ballot at the last general election, for candidates for party nomination are required to make affidavit that "they affiliated with such party at the last general election in this state, and * * * voted for a majority of the candidates of such party at the last general election," etc. (Rev. Laws, 1740.) The candidates of parties which did not appear on the official ballot at the last general election could not make the required affidavit, and, if they could not obtain a place on the official ballot by petition, the party could not secure representation. Under the law as it was while the convention system prevailed, a party must have cast three per cent of the entire vote

cast at the last preceding general election in order to nominate by the convention method, but, as before stated, it was always recognized that a new party organization could obtain a place on the ballot under its party designation by petition of electors.

The cases mainly relied upon by the attorney-general—*Atkeson v. Lay*, 115 Mo. 538, 551, 22 S. W. 481; *State v. Rotwitt*, 18 Mont. 502, 46 Pac. 373; *State v. Tooker*, 18 Mont. 540, 46 Pac. 531, 34 L. R. A. 315; *Phillips v. Curtis*, 4 Idaho, 193, 38 Pac. 405—are distinguishable in principle from the case now before this court. In all these cases it was sought to obtain a regular party nomination of a previously existing party by means of a petition of electors. This, it was held, could not be done, for the reason that the statutes provided a method for the nomination of such candidates, and a body of electors could not arrogate to themselves the functions of a party organization. In the case of *Atkeson v. Lay*, *supra*, it was, however, held that the candidate nominated by petition of electors, while not entitled to go on the ballot as a regular party nominee, was entitled to go on the ballot in such a manner as to disclose the true status of his nomination. The court held: "In his case the requirements of the situation would have been fairly met by the heading 'Electors' (Republican) ticket,' which would have indicated as plainly to the voter the nature and character of his candidacy under one of his certificates as did the other headings indicate the character of the candidacy of those whose names appeared under those headings; * * * so, also, he had the right to have his name placed under another heading, at the top of the ticket, * * * which heading might well have been 'Electors' (People's) ticket,' or 'Electors' (People's party) ticket.'"

To the same effect is *Phillips v. Curtis*, *supra*.

If the Progressive party was a previously existing party, and a petition of electors was also filed designating candidates as of that party faith, an additional word or words would doubtless have to be used in the secretary of state's certificate so as to distinguish the candidates

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from the regular party nominees, but there could be no doubt of their right to use the party name in conjunction with appropriate qualifying words. We need not consider what would be the case, as suggested, if several petitions had been filed nominating candidates as of the Progressive party. One solution of the proposition that suggests itself is that they would all be entitled to appropriate recognition, and all entitled to go on the ballot, but it will be time enough to cross that bridge when the court comes to it.

We think the candidates named in the petition are entitled to go on the official ballot with the designation "Progressive party," and that the writ prohibiting the respondent from certifying them as "Independent" should issue.

It is so ordered.

TALBOT, J., concurring:

Under section 1834 of the Revised Laws, which provides that "nominations for public office may be made by convention of delegates representing a political party which at the last election polled at least three per cent of the entire vote," under section 1835, which states, "all nominations made by any such convention shall be certified as follows: A certificate of nomination, which must be in writing, and shall contain the name of each person nominated, his residence and the office for which he is nominated, and shall designate the party or principle which such convention represents," and under the language of section 1836, that "a candidate for public office may be nominated otherwise than by a convention in the manner following: A certificate of nomination, containing the name of the candidate to be nominated, with the other information required to be given in the certificate required in section 3 of this act (preceding section, Rev. Laws, 1835), shall be signed by electors residing within the district or political division for which candidates are to be presented, equal in number to at least ten per cent of the entire vote cast at the last preceding election"—it

Talbot, J., concurring

is clear that a certificate of nomination made by such a political convention should designate the party or principle which such convention represents.

In regard to what the certificate of nomination by petition of electors shall contain, when considered in connection with the words "with the other information required to be given in the certificate," provided in cases for nomination by convention which "shall designate the party or principle which such convention represents," the requisites are not so clear, and differences of opinion have arisen. The Progressive party, having been formed in the nation and state last summer, could not file a certificate of nomination of nominees by its convention under section 1834 of the Revised Laws, because it was not in existence and did not poll three per cent of the vote at the last election. The only other method provided by the statute for making nominations has been followed, and certificates of nominations signed by more than the required percentage of electors have been filed. It is stated in the certificates that the "nominees represent the Progressive party and the principles thereof, as declared and proclaimed by the Progressive National Convention at Chicago, Illinois, on August 7, 1912, nominating Theodore Roosevelt of New York for president of the United States and Hiram W. Johnson of California for vice-president of the United States."

It may be observed that section 1834 defines a convention which may make nominations, but the statute nowhere defines a political party; and the nominations here having been made by a certificate signed by the requisite number of electors, certifying that the nominees represent the Progressive party, and filed without objection, the question arises as to whether such a certificate may properly designate the party or principles for which the nominees stand, as clearly required in a certificate of nomination by a convention, whether the secretary of state ought to certify to the county clerks the names of the nominees with the party or principle they represent, as stated in the certificate, or whether he

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may ignore this part of the certificate, and certify that the nominees are independent candidates.

Section 1840 states: "Not less than thirty-five days before an election to fill any public office, the secretary of state shall certify to the county clerk of each county within this state the name of each person and the name of the office for which he is nominated, as specified in the certificate of nomination filed with him." The county clerks are directed to supervise the printing of the ballots, and section 1844 provides that "the political designation of each candidate shall be printed opposite his name." There is no specific provision in the statute directing the secretary of state to certify the names of candidates under party designation or principle or as independents, but, as these designations serve no good purpose except for the information of the voter, it may be implied that it is the duty of the secretary of state to certify to the county clerks, not only "the name of each person and the name of the office for which he is nominated," but the party designation or principle for which he stands, if properly stated in the certificate of nomination. This seems to be necessary in order that compliance may be had with the statutory provision for the printing of the political designation opposite the names of the candidates. By the language quoted in sections 1835 and 1836, it is apparently the intention of the legislature and the spirit of the statute that certificates of nomination, other than by convention, and when made by the requisite number of electors, shall designate the party which the candidate represents, if he represents a party, or principle for which he stands, similarly to the requirement for a certificate of nomination by a convention. Under this construction, may not the candidates or the electors signing the petition, and a new party which they represent, although without power to nominate because it polled no vote at the preceding election, designate, in a certificate signed by the required percentage of voters, the party or principle for which the nominees stand, so long as their designation does not take the

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name or infringe upon the rights of any other party? As several new political parties have been allowed to do this during the last twenty years, without any break in the precedent so established, and no new party can get on the ballot in any other way so as to have a standing at an election and poll the necessary percentage of votes to enable it to nominate candidates by convention for the next election, and as it is not fair to assume that the legislature intended to prevent the formation of new parties or to give the parties existing at the time the law was passed a monopoly or trust in the right to nominate candidates by convention, a liberal and just construction of the law will allow a new political party to put its designation on the ballot, as has so often been done. The legislature cannot deprive an elector who has been a resident of the state six months, and who has not committed any crime, of his inherent right under the constitution to exercise the elective franchise and vote for his choice. It may regulate, but it cannot take away, the right to vote, and it ought not to discriminate; and when the language of the statute is open to another, and the most reasonable, construction, it ought not to be so construed as to hold that the legislature has discriminated in favor of existing parties and against the formation and rights of new parties.

As we have seen, the designation of a party or principle for which the candidate stands is provided for in the certificate of nomination by a convention and indirectly in the certificate of nomination by petition of electors; and it naturally follows that power to make this designation is vested in the convention or electors authorized to make the certificate. It must be inferred that the political designation of a candidate to be printed opposite his name on the ballot is the same which has been fixed in the certificate. It has been suggested in the argument that the respondent as secretary of state cannot assume the functions of a high priest, with the exclusive power of christening a new party. He may refuse to file a certificate which is not in proper form, or perhaps to certify

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to the county clerks a party designation in the certificate which is unauthorized, different from the party to which the certificate belongs, or which is contrary to the authority of that party; but there is nothing anywhere in the statute which, by the merest inference, can give him the semblance of power to interpolate into the certificate, or to certify or to order onto the official ballot any party designation or principle not stated in the certificate of nomination. If, as proposed in this case, the secretary of state may certify a candidate on the official ballot as an "Independent" when the candidate has been nominated by a certificate as a "Progressive," he might with equal power certify on the official ballot as "Independent" candidates nominated as Democrats, Republicans, or Socialists. As no authority is given for making a party designation except in the certificate of nomination, it is apparent that no officer, after the filing of the certificate, is authorized to change the designation of the party or principle for which the candidate stands, and that the certification of the name and party designation to the county clerk and the printing on the ballot ought to follow the certificate.

Uncertainty regarding these statutory provisions may have arisen from their consideration in connection with decisions in cases in which the candidate attempted to take advantage of some party name to which he was not entitled. A good name may have protection, and, if these nominees were attempting to certify under some party name to which other candidates were entitled, it would be different. "Who steals my purse, steals trash; * * * but he who filches from me my good name, robs me of that which not enriches him, and makes me poor indeed." An imitator of Sandow, the strong man, was restrained from advertising and appearing before the public as "Sandowe." An inventor, after long advertising and the sale and manufacture of fountain pens, was able to prohibit the advertising and sale of a different pen under the same name by another man of that name. This case bears no resemblance to the present one in

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Kansas, where, as in California, presidential electors avowedly supporting Theodore Roosevelt, the nominee of the Progressive party, are seeking election under the name and prestige of the Republican party, the nominee of which is William H. Taft. It has been held in a number of instances that candidates may not proceed as, when they are not, party nominees. It may be admitted that the legislature may abolish the right of any political party to make nominations, as has been done in regard to judicial officers in some of the states. So long as the right of a political party to make nominations is recognized, the party ought to be allowed to fill nominations or leave any blank at will, and no candidate who is not such should be allowed to appear as the regular party nominee on the certificate or ballot. Different conditions are presented here. The wrongful attempt to pose, without authority, as the nominee of an existing political party, may be readily distinguished from the right to form a new party, and have that party adopt a name, select candidates, and have them nominated by the certificate designating the new party name and signed by the requisite number of electors. These nominees are not usurping the prerogatives of any other party, and no good reason appears why the new party which they represent and the principles which they espouse may not be designated in the certificate and given force with its other statutory provisions by the signature of the necessary percentage of voters, nor why the secretary of state should not certify their nominations accordingly, so that their names and their new party designation may be printed upon the ballots in accordance with the truth for the information of the voters at the polls.

The decisions properly hold that in cases like this, where the right or title of no party is being infringed, the statute will be liberally construed in favor of allowing the designation of the party or principle for which the candidate stands. No political party appears to claim that any usurpation or injury will result if the designation "Progressive party" is placed with the names

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of these nominees on the official ballot. No issue is raised against the allegation that they are the nominees of the Progressive party. The Progressive party is not here contending that they are not its nominees. If it were shown that no Progressive party has been formed, then there would be none to be injured, and no wrong would result from allowing the nominees to be designated as "Progressive." This new party has no legal power to nominate its candidates, except through a certificate of nomination signed by electors numbering at least ten per cent of the votes cast at the last election. A less number may form a political party; and, whether all the signers of the petition belonged to the new party or not, by the statute the certificate becomes effective when signed by this number of electors. In the Colorado case, which was approved in the Minnesota case, the court said: "The statute does not purport to give a definition of a political party. In the Century Dictionary a political party is thus defined. 'A company or number of persons ranged on one side, or united in opinion or design, in opposition to others in the community; those who favor or are united to promote certain views or opinions,' and the definition in Webster's Dictionary is substantially the same. In this state there is no statute that in any way qualifies this definition, and a political party here, as elsewhere generally, is a voluntary association of voters who are desirous of promoting a common political end, or carrying out a certain line of policy. The association may be formed, not merely by a convention, but in other ways; and when electors to the number named in section 6 of the statute come together and agree upon a certain policy, and make a certain list of nominees, and select a party name and emblem, they may file with the proper officer the certificate evidencing their acts; and, while the mere filing of the certificate or petition may not create a political party, it is, nevertheless, the evidence of its previous formation, and the result of the acts of the association of electors culminating in a list of nominees gives to the organiza-

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tion, with respect to its nominees, the same rights on the official ballot that are acquired by the nominees of a previously existing political party that makes its nominations by convention or a nominating committee." (25 Colo. 403, 55 Pac. 181.)

In the limited time for consideration since the argument and submission of the case yesterday afternoon, it is my conclusion that respondent may properly certify the name of the party as designated by electors in excess of the number required to sign the certificate. I concur in most of the views stated in the opinion of Mr. Justice NORCROSS, in the conclusion that the candidates' names in the petition are entitled to go on the official ballot with the designation "Progressive party," and in the order that the writ issue prohibiting the respondent from certifying them as "Independent."

SWEENEY, C. J., dissenting:

I cannot agree with the conclusions reached by my learned associates in the case under consideration.

Our legislature has provided two methods whereby nominees may get on the official ballot, and not otherwise. In one way party candidates are to be nominated pursuant to the primary law as passed in 1909 and amended in 1911. The other method left open to those who do not represent a regular party, or who are not privileged to be designated as party nominees, is by an independent course provided for by the Australian ballot law, approved March 13, 1891. To become entitled to go on the official ballot as a nominee of a party, the nominee must comply with the law as provided by our legislature which provides how party nominees must be selected; and, if a candidate decides to go otherwise than as prescribed by our legislature for party nominees, he must come on the official ballot by the independent route prescribed by the legislature for independent candidates. In the present case the candidates who desire to go on the official ballot as candidates of the Progressive party have not complied with the law provided by our legisla-

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ture, which would authorize them to go on as candidates of a party, and in consequence, having chosen the independent route by securing a sufficient number of signatures to authorize them to get on the ballot by the independent course of action prescribed by our legislature, they are forced to go on as independents as distinguished from regular party nominees. My learned associates and counsel for relator seem to fail to grasp the distinction between a political party and a faction of a political party. In other words, the present candidates, who have secured a sufficient number of signatures required by law, which provides for independent candidates to go on the official ballot, represent but a faction of the Progressive party as distinguished from being the candidates of the Progressive party as a whole.

As illustrative of my position, suppose two or three sets of candidates presented their names to the secretary of state as the "Progressive party" candidates. The law provides that each party is entitled to one nominee for United States senator, one for congressman, and so on for the respective offices. How could the secretary of state know, if two or more petitions were presented to him simultaneously, claiming to be the Progressive party candidates, which candidates really represent the Progressive party nominees, unless they had complied with the law, submitting themselves to their party as a whole or by those in control as required by law, to say authoritatively that they are entitled to the party appellation? The petitions presented by the candidates who call themselves the Progressive party nominees are signed by a conglomeration of electors of different political faiths, some of whom may be Democrats, Republicans, Socialists, or so-called Progressives. The legislature has prescribed that, before any candidate is entitled to go on the official ballot as the nominee of a party, the party must have polled at least three per cent of the votes of the state. There does not seem to be any question but that the legislature has the authority to designate the percentage which is requisite to entitle a party to become worthy of

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the dignity of the name to authorize it to go on the official ballot as a party. Certainly, if two petitions by two candidates for United States senator or representative in Congress were presented to the secretary of state, they both could not represent the Progressive party in view of the fact that each party is entitled to but one nominee. Unquestionably any number of citizens are entitled to form a new political party, but when they do so, before their nominees can go on the official ballot as the nominees of that party, they must first conform to the existing laws provided by our legislature as to the manner and mode of acquiring a place on the official ballot.

Counsel for relator in their argument, appeared to rely mainly upon the case of *Schafer v. Whipple*, 25 Colo. 400, 55 Pac. 180, and this case is cited with approval by my associates as sustaining the majority opinion of this court. A careful examination of this case will disclose that it is not in point, and is distinguishable from the case at bar, for the reason that it is founded upon a special statute of Colorado, permitting electors desiring to nominate candidates by petition to select a name and emblem by which their candidates should be designated upon the ticket. This is apparent by the reading of pages 401 and 402 of 25 Colo., 55 Pac. 180, in which the laws are partially set forth, the full laws appearing in Colorado Session Laws 1891, p. 151, and Laws Extra Sess. 1894, p. 62. It is further shown by reference to the citations of this case in 15 Cyc. 335-336, where the text of the work discloses that this decision was founded upon a statute as above stated. By reference to the cases of *Whipple v. Kleckner*, 25 Colo. 423, 55 Pac. 163, and *Phillips v. Smith*, 25 Colo. 398, 55 Pac. 177, appearing in the same volume of Colorado reports, it appears that great confusion arose in Colorado over this provision allowing electors in their petitions to designate the party of their candidates, and the court was called upon in these two cases of nominations by petition to determine which faction really represented the political party they had both claimed to represent.

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In the case at bar, if the petitioner's contention is correct, and the party name of the candidates can be designated in a nominating petition by electors, it is entirely possible that this court could now be sitting to determine which one of four or five rival factions really represent the "Progressive party," and which faction is entitled to have its nominees go upon the ballot at the general election under such party name. A "nominee" is either a "party nominee" selected by his party according to law, or he is an "independent nominee" selected by "electors," such as the petitioners represented in the present case, and all nominees fall within one of these classes, and the secretary of state must certify them accordingly. The fact that previous secretaries of state have allowed nominees of new parties to go on the ballot without complying with the law is no valid reason, if they were wrong in doing so in the first case, for justifying a continuance of this error. The fact of the matter is that all of the nominees of the new parties designated in the majority opinion were placed on the ballot prior to the passage of the primary act, which abolished the convention system of nominating, and, further, the point of whether or not they were entitled to go on the ballot as party nominees was never raised or questioned, or presented for consideration either to the attorney-general or this court for an opinion thereon. If the question had been raised, no doubt the writ of prohibition would have been issued against allowing their names to go on the ballot until they had complied with the law in this respect. Because an error originally committed was thereafter followed would not cure the original error if followed indefinitely, unless the law-making power remedied the defect. For more than nineteen years various of our secretaries of state acted as ex officio clerks of the supreme court, but, when the question was presented for the first time recently, the error was remedied, and the secretary of state denied the right so to act.

Various courts have passed upon the point at issue in well-reasoned opinions sustaining the position of the

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attorney-general in his opinion to the secretary of state. (*Atkeson v. Lay*, 115 Mo. 551, 22 S.W. 481; *State v. Rotwitt*, 18 Mont. 502, 46 Pac. 373-374; *State v. Tooker*, 18 Mont. 540, 46 Pac. 531; *State v. Reek*, 18 Mont. 557, 46 Pac. 438.)

The Supreme Court of Missouri in the case of *Atkeson v. Lay*, 115 Mo. 551, 22 S. W. 484, speaking on this point, said: "The law makes no provision for the nomination of candidates by a political party of less strength than the required three per cent, or in any other manner than by a convention of delegates or a primary election, and only candidates so nominated become the nominees of a political party, and as such entitled to go upon the ballot to be so voted for. Candidates nominated by electors are not the nominees of a political party, but of the individual electors nominating them, and only as such are entitled to go upon the ballot."

In the case of *State v. Rotwitt*, 18 Mont. 509, 510, 46 Pac. 373, 374, the Supreme Court of Montana, reviewing this question, said: "The law contemplates nominations by conventions, by primary meetings held to make nominations, or by petition by a certain number of electors resident within the district or political division in which the officer is to be elected. Conventions or primary meeting nominations, under the law, are made by organized assemblages of electors or delegates representing a political party or principle, and only candidates so nominated are the nominees of political parties, and only such are entitled to be placed as regular party nominees upon the official ballots. A candidate certified as nominated by electors is not nominated by a political party. He is simply a candidate of those individual electors who have joined in nominating him, and he is only entitled to be placed upon the ballot as such a candidate. * * * The secretary of state, therefore, cannot certify a candidate so nominated by electors as the candidate of a political party, for clearly he is not such a candidate, and has no place in a group of candidates certified as nominated by a regular political party convention or organization under the name of the party making such nominations. * * *"

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The Supreme Court of Oregon, in the case of *Clinton v. City of Portland*, 26 Or. 410, 38 Pac. 407, said: "The electors' nomination of petitioner, containing, as it does, in our view, the requisite number of names, and having been filed in time, entitles the petitioner to have his name placed upon the official ballot as an independent candidate for the office of senator. * * * To hold that any 150 electors may secure the name of any person they see fit to indorse to be placed upon the ticket of any party would, we think, be opening the door to the perpetration of fraud, would, in fact, be offering an inducement therefor. And neither American politics nor politicians have as yet, even among the most utopian organizations, reached that stage of purity which will warrant or excuse the removing of all legal restraints from them."

In Pennsylvania it was held: "A faction of a political party is not authorized to nominate by certificates, though polling under a distinctive title over two per centum of the largest entire vote cast in the state at the last preceding election." (*Certificates of Nomination of McKinley-Citizens' Party*, 6 Pa. Dist. R. 109.)

The Supreme Court of Kansas having had this identical question under consideration, as to whether or not the presidential electors of the "Progressive party" should go on the official ballot as "Independents" or "Progressive party" nominees, held late this afternoon, according to an Associated Press telegram, adversely to the contentions of relator and the majority opinion of this court, that the "Progressive party electors must go on the official ballot as 'Independents,'" for the reason they had not complied with the law authorizing them to go on the ballot as party nominees.

For the foregoing reasons, I am of the opinion that the secretary of state was right in refusing to allow the candidates of the Progressive party to go on the official ballot otherwise than as independent candidates, because they had not complied with the law, and that, having taken the course prescribed by law for independent candidates, the secretary of state was not only authorized,

Points decided

but compelled, to certify their names as "Independent" candidates.

The writ prayed for should be denied.

[No. 2010]

**IN THE MATTER OF THE APPLICATION OF J. FRANK
TRAMNER FOR A WRIT OF HABEAS CORPUS.**

1. CRIMINAL LAW—TRIAL—PENDING SENTENCE OF LIFE IMPRISONMENT.

Under Rev. Laws, 6908, 6921, 7459, providing that every person shall be liable to punishment for a public offense committed by him, that there is no limitation of the time within which a prosecution for murder must be commenced, and that, when it is necessary to have one imprisoned brought before a court, an order for that purpose may be made, one sentenced to life imprisonment for murder may be tried pending his incarceration for a murder previously committed, and in the event of his conviction thereof, and sentence to death, the sentence may be carried into execution, notwithstanding section 7256, providing that, where defendant has been convicted of two or more offenses before judgment on either, the judgment may be that the imprisonment on any one may commence at the expiration of the imprisonment on any other.

2. CRIMINAL LAW—CONTINUANCE—DISCRETION OF TRIAL COURT.

A continuance in a criminal case is within the discretion of the trial court, and in the absence of an abuse of discretion its action will be sustained.

3. CRIMINAL LAW—SPEEDY TRIAL—OBJECTIONS.

Where accused, indicted under two indictments for a double murder, did not object to a continuance of the trial under one indictment, pending his trial under the other, resulting in his conviction and sentence to life imprisonment, and did not apply for a speedy trial, he could not complain that he was not given a speedy trial.

4. CRIMINAL LAW—SPEEDY TRIAL—OBJECTIONS.

Where accused, indicted under two indictments for a double murder, obtained a change of venue in the case of one indictment, but the other indictment was not removed, and at the next term of court the latter case was called for trial, and subsequently removed to another county on a change of venue, accused could not complain that he was not given a speedy trial under such indictment, as guaranteed by the constitution and Rev. Laws, 7396.

Argument for Respondent

5. CRIMINAL LAW—SPEEDY TRIAL—OBJECTIONS.

The statute guaranteeing a speedy trial does not apply while accused is in prison serving a sentence on another charge; but accused, serving such sentence, may demand that he be tried on all indictments against him, and a refusal to try him may enable him to invoke the statute.

ORIGINAL PROCEEDING for a writ of *habeas corpus*.
Writ denied. Proceedings dismissed.

The facts sufficiently appear in the opinion.

Parker & Frame, for Petitioner:

Because petitioner is serving a sentence under a judgment of court he cannot be tried for any other offense pending his imprisonment under the judgment. (*Ex Parte Meyers*, 44 Mo. 280; *State v. Buck*, 120 Mo. 479, 25 S. W. 573; *Ex Parte Allen*, 196 Mo. 231, 95 S. W. 415; *State v. Bell*, 212 Mo. 130, 111 S. W. 29.)

The proper place of confinement of the petitioner is in the state penitentiary of the State of Nevada; and the superior right to his custody is in the warden of such penitentiary. (*Re Collins*, 8 Cal. App. 367, 97 Pac. 189; *Ex Parte McGuire*, 135 Cal. 339, 87 Am. St. Rep. 105, 67 Pac. 327.)

Petitioner is entitled to his discharge under indictment No. 2 because he was not accorded a speedy trial. (*State v. Stalmaker*, 2 Brev. 44; *Ford v. Superior Ct.*, 17 Cal. App. 1, 118 Pac. 96; *McLeod v. Graham*, 6 Okl. Crim. Rep. 197, 118 Pac. 160; *Re Ford*, 160 Cal. 334, 35 L. R. A. (N. S.) 882, 116 Pac. 757, Ann. Cas. 1912 D. 1267.)

Cleveland H. Baker, Attorney-General, for Respondent:

Defendant undergoing a sentence of life imprisonment for the crime of murder can be brought again to the bar of justice to answer for another charge of murder. (*Thomas v. People*, 67 N. Y. 226; 1 Bishop, Crim. Law, 5th ed. sec. 953; *Clifford v. Dryden*, 31 Wash. 545, 72 Pac. 97; *Willard v. Superior Ct.*, 82 Cal. 461, 22 Pac. 1120; *Gaines v. State*, 53 S. W. 624; *People v. Flynn*, 7 Utah, 378, 26 Pac. 1114; *United States v. Farrell*, 5 Cranch, C. C. 311, Fed. Cas. No. 15,074; *Russel v. Com.*, 7 Serg. & R. 489;

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Com. v. Leath, 1 Va. Cas. 151; *Howard v. United States*, 34 L. R. A. 509, 21 C. C. A. 586, 43 U. S. App. 678, 75 Fed. 986; *Rex v. Wilkes*, 4 Burr. 2576; *Rigor v. State*, 101 Md. 465, 61 Atl. 631, 4 Ann. Cas. 719; *State v. Wilson*, 38 Conn. 126; *People v. Hong Ah Duck*, 61 Cal. 387; *People v. Majors*, 65 Cal. 138, 52 Am. Rep. 295, 3 Pac. 597, 5 Am. Crim. Rep. 486; *Ex Parte Green*, 86 Cal. 427, 25 Pac. 21; *Ex Parte Morton*, 132 Cal. 346, 64 Pac. 469; *Ex Parte McGuire*, 135 Cal. 339, 87 Am. St. Rep. 105, 67 Pac. 327.)

A continuance in a criminal case is within the discretion of the court; and unless there is an abuse of its discretion, its action will be sustained. (*State v. Chapman*, 6 Nev. 320; *State v. Rosemurgey*, 9 Nev. 308.)

By the Court, SWEENEY, C. J.:

The petitioner, together with one Nimrod Urie, was indicted by the grand jury of Humboldt County, Nevada, for the commission of a double murder, committed at Imlay, in said county, wherein Eugene Quilici and Marie Quilici were robbed and murdered. The defendant, Urie, upon motion was granted a separate trial, and upon such trial, held at Winnemucca, Humboldt County, Nevada, was tried and found guilty of murder in the first degree, and sentenced by the court to be hanged by the neck until he be dead. An appeal from this judgment is pending and undetermined at the present time in this court. The petitioner herein was granted a change of venue from Humboldt County to Washoe County, and upon the trial was convicted of murder in the first degree, and for punishment was ordered confined in the penitentiary for life.

The petitioner was indicted under two indictments for the crime of murder: Indictment No. 1, for the murder of Eugene Quilici; and indictment No. 2, for the murder of Marie Quilici. After conviction upon indictment No. 1, the petitioner was taken to the Nevada state prison and entered upon the serving of his life sentence, and three months later, by an order of the judge of the Sixth judicial district court, he was removed from the state

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prison and placed in the custody of the sheriff of Washoe County, and upon being brought into court for the purpose of having a day set to try him upon indictment No. 2, for the murder of Marie Quilici, petitioner obtained a writ of *habeas corpus* from this court, setting forth that he was illegally detained of his liberty, chiefly upon the two grounds, to wit: First, that under a judgment and life sentence now in force, under indictment No. 1, the only lawful place of confinement of petitioner is in the state prison under said judgment and sentence, and that proceedings on indictment No. 2 are thereby suspended; second, that, in the event this court should hold that the Second judicial district court should have the right to the custody of the person of petitioner under indictment No. 2, the petitioner has not been accorded a speedy trial as by law required, and that under the facts as agreed upon in the stipulation following he must be discharged:

"It is hereby stipulated and agreed by and between the attorneys for the State of Nevada and the attorneys for the petitioner, as follows:

"That on the ---- day of March, 1911, the grand jury, in and for Humboldt County, Nevada, returned two indictments against the petitioner, J. Frank Tramner, and one Nimrod Urie, which said indictments were numbered 1 and 2, respectively.

"That indictment No. 1 was for the killing of Eugene Quilici, and No. 2 was for the killing of Marie Quilici. Both of said crimes are alleged to have occurred at the same time and place.

"That at the time of the finding and return of the two indictments against your petitioner, the grand jury, in and for Humboldt County, Nevada, returned certain other indictments as follows: State of Nevada against Watson, for burglary; State of Nevada against Barnum, for forgery; State of Nevada against Wilson, for gambling; State of Nevada against Morrison, for gambling; State of Nevada against Friend, for embezzlement.

"That after the return of the indictments against the petitioner, and on the 9th day of March, 1911, the peti-

tioner entered his plea of not guilty to both of said indictments.

"That at the time of the return of the said indictments against your petitioner, and at the time of his entering his plea of not guilty to the same, your petitioner was in the custody of the sheriff of Humboldt County, Nevada.

"That after the return of said indictments numbered 1 and 2, against your petitioner, and at the May term of the district court of the Sixth judicial district, in and for Humboldt County, Nevada, indictment No. 1 against the petitioner was set down for trial, and afterward, and on the____day of May, 1911, was sent to Washoe County, Nevada, by a change of venue. .

"That afterward, and on the____day of July, 1911, this petitioner was placed on trial under said indictment No. 1, and was found guilty of murder in the first degree, and his punishment fixed at life imprisonment in the penitentiary of the State of Nevada.

"That thereafter and on the 14th day of July, 1911, judgment and sentence was pronounced on said indictment No. 1 against this petitioner, and a commitment was issued out of the Second judicial district court in and for Washoe County, Nevada, sentencing and committing him to imprisonment for life in the state penitentiary, and directing the sheriff of Washoe County to deliver the petitioner to the warden of the state penitentiary.

"That in pursuance of said judgment and sentence and commitment petitioner was immediately thereafter, and on the 15th day of July, 1911, taken to Carson City, Nevada, and delivered to the warden of the state penitentiary, in whose custody the petitioner remained under said commitment and under the sentence imposed by the Second judicial district court of Washoe County, Nevada, under said indictment No. 1.

"That the petitioner was confined and restrained by the said warden of the penitentiary under said commitment and sentence until about the 29th day of October, 1911, when the petitioner was taken from the custody of the

warden of the penitentiary by the sheriff of Humboldt County, Nevada, and taken to Winnemucca, in said Humboldt County, Nevada.

"That on the 10th day of March, 1911, in the Sixth judicial district court in and for Humboldt County, State of Nevada, the following order was made in the case of the State of Nevada against J. Frank Tramner, under indictment No. 2: 'The defendants, the counsel, and the district attorney being present in court, it is ordered that this cause be continued for further setting.'

"That there was no other or further order made in the case under indictment No. 2, and no further steps taken by the state to bring this petitioner to trial under indictment No. 2, until the 27th day of October, 1911, when an order was made and entered by the judge of the Sixth judicial district court, in and for Humboldt County, Nevada, to bring the petitioner before the said district court of Humboldt County, Nevada, for the purpose of having the case under indictment No. 2 set for trial; said indictment No. 2 being the same indictment No. 2 that was found and returned by the grand jury of Humboldt County, Nevada, on the ---- day of March, 1911, aforesaid, and said order being the order set out by the return of the sheriff of Washoe County, Nevada, herein.

"That afterward, and on the 1st day of November, 1911, a severance was ordered in the case under indictment No. 2, and the case against your petitioner was set for trial on November 25, 1911.

"That afterward, and on November 3, 1911, a change of venue was granted to Washoe County, Nevada, and the petitioner was delivered to the sheriff of Washoe County, Nevada.

"That all of the indictments returned by the grand jury of Humboldt County, Nevada, on the 9th day of March, 1911, were tried and disposed of at the May term of the district court of the Sixth judicial district, excepting indictments Nos. 1 and 2 against the petitioner.

"That at the said May term of the district court of Humboldt County, Nevada, a jury was in attendance and

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the witnesses for the state could have been procured for a trial under indictment No. 2, by the use of reasonable diligence.

"That the petitioner was not brought to trial under said indictment No. 2, the same being the indictment that petitioner is now being prosecuted under, for the reason that the district attorney had elected to bring the petitioner to trial under indictment No. 1, because the said indictment No. 1 was in his opinion the strongest case against the petitioner, and that the said district attorney expected a conviction under indictment No. 1, and that the death penalty would be inflicted, and that for that reason it would not be necessary to try indictment No. 2, and prosecute the petitioner thereunder.

"That at the time of the trial and conviction and sentence of the petitioner under indictment No. 1 in the Second judicial district court of Washoe County, Nevada, indictment No. 2 had been found and was standing against the petitioner in the Sixth judicial district court in and for Humboldt County, Nevada.

"That by the trial of the other indictments returned by the grand jury of Humboldt County, Nevada, on the 9th day of March, 1911, this indictment No. 2, that the petitioner is now being prosecuted under, was displaced and set aside on the calendar of the clerk of the Sixth judicial district court, and the rest of said indictments tried in its place and stead, without any affidavits being filed, upon two days' notice, or without any application being made by either party, and without any order of the district court having been made therefor, as required by section 4281 of Cutting's Compiled Laws of the State of Nevada, and that said indictment No. 2 was so displaced and set aside, and the rest of said indictments heard and tried in its place and stead, without any cause having been shown, or without any cause existing, for the so doing whatever, and not upon the application of the petitioner.

"That the judgment and sentence imposed by the Second judicial district court of the State of Nevada on the 14th day of July, 1911, whereby the said petitioner

was sentenced to imprisonment for life in the state penitentiary, is now in full force and effect, and that the same has not been appealed from, vacated, modified, or set aside, and that the petitioner has not been reprieved, pardoned, or paroled, or his sentence commuted, or the same suspended, and that said judgment and sentence is now in full force and effect.

"That a term of the court was held in Humboldt County, Nevada, beginning on the ---- day of May, 1911, at which time a jury was in attendance, and at which time civil and criminal cases were both tried by the jury.

"That on the ---- day of January, 1912, the case of the State of Nevada against J. Frank Tramner, under indictment No. 2, was called for setting, and the petitioner, at said time appearing in court in person and by counsel, objected to the setting of said case under indictment No. 2, or to any further proceedings therein, for the reasons, first, that the petitioner was at the time undergoing sentence in the state penitentiary as hereinbefore set out, and that the said sentence was in full force and effect, and that thereunder the warden of the state penitentiary was entitled to the exclusive custody of this petitioner under said sentence, and that the Second judicial district court in and for Washoe County, Nevada, had no rightful jurisdiction over the person of the defendant, and was not entitled to custody over his person, and that the judgment and sentence hereinbefore set forth operated to suspend, during its existence, any other cause or proceeding against the petitioner, and especially the proceeding on indictment No. 2, and that the State of Nevada had, by its election to proceed to final judgment and sentence on indictment No. 1, waived its right to proceed to trial upon indictment No. 2, and the lawful place of confinement and the lawful custody of petitioner was with the warden of the state penitentiary, by virtue of the conviction and sentence under indictment No. 1.

"And, second, your petitioner has not been given a speedy trial as herein mentioned, and prayed the Second judicial district court to make an order discharging peti-

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tioner from the second indictment and remanding him to the custody of the said warden, in execution of the sentence under indictment No. 1, which said objections were overruled, and the case set down for trial.

"That at the time that the indictments were returned against this petitioner it was the custom of the district court, in and for Humboldt County, Nevada, to hold two terms of court each year, one in April and the other in October. That at the time of the making of the order by the judge of the Sixth judicial district, Humboldt County, whereby the indictment No. 2 was continued, for further setting, this petitioner made no objections to the making of said order.

"It is further stipulated that if this court shall hold that the petitioner shall be tried under indictment No. 2, and if the jury in said trial should hold the petitioner guilty and inflict the death sentence, whether that sentence could be executed until the expiration of the sentence now existing under indictment No. 1.

"[Signed] Cleveland H. Baker, Attorney-General.

"Parker & Frame, Attorneys for Petitioner."

[1] Answering the first contention of petitioner, which, when stripped of its technical verbiage, is simply a question of whether or not, when one is undergoing a sentence of life imprisonment for murder, he can be placed on trial for another murder, and if convicted on the second indictment for murder, if a maximum sentence of death should be imposed, whether or not he could be executed. Petitioner's strong contention is that, because petitioner is serving a sentence under a judgment of court, he cannot be tried for any other offense pending his incarceration under the judgment.

Petitioner's main reliance upon this point is based on section 7256, Revised Laws of Nevada, which reads as follows: "If the defendant has been convicted of two or more offenses before judgment on either, the judgment may be that the imprisonment upon any one may commence at the expiration of the imprisonment upon any other of the offenses."

Reviewing this section, we cannot see that the legislature ever intended to preclude a prosecution for another untried offense pending the incarceration of the accused on a prior conviction. It is manifest from a reading of this statute that it provides only for cases in which there are convictions of two or more offenses before judgment on either, and the legislature did not have in mind any such case as is at present under consideration. Under the section above quoted the court was given the discretion, where a conviction was had on two or more offenses before judgment, to make the sentences commence upon the expiration of the term of imprisonment imposed for any other of the offenses; but there is nothing in the section, as we view and construe it, which would constitute a bar to criminal prosecution in other cases which had not gone to judgment while the accused is serving his sentence.

If the construction as contended for by petitioner were so, the results which would follow such a construction of the statute would be very dangerous to society, and it would be deprived of that protection that the law intends to throw around its citizens, and give an unbridled license to criminals to commit crime, protect them for a long period from prosecution, and allow them abundant opportunity to avoid the consequences of their criminal acts. The word "imprisonment" in the statute denies the contention of counsel for petitioner, for the reason that, if a death punishment were inflicted, it would present a different character of punishment than designated in the statute in question, because the statute contemplates, even if there was merit in counsel's contention on this point, a sentence of imprisonment, and not a death penalty.

The Supreme Court of Washington, in the case of *Clifford v. Dryden*, 31 Wash. 547, 72 Pac. 97, in commenting upon the baneful results which would follow the construction contended for by counsel for petitioner, properly says: "It might very reasonably happen, considering the difficulty of preserving and perpetuating testimony, that

if the second trial were postponed until after a lengthy sentence had been served it would result in the failure of justice."

The attorney-general, in his able brief, instancing how justice could be retarded, were it not possible to try a convict pending his incarceration for an offense previously committed, illustrating, says: "For instance, A. commits a murder in Nye County, and successfully escapes to Washoe County, and burglarizes a store, is caught there, arrested, pleads guilty, and is sentenced to the penitentiary, and while there his identity is discovered as the man who committed the murder in Nye County. Under these circumstances, if petitioner's contention of the law is correct, he could not be tried for six years, which, of course, considering the difficulty of keeping witnesses intact for the murder in Nye County, etc., would amount to his escaping entirely from prosecution for the offense. Another instance would be when A., convicted of crime, is sentenced to the state prison, and while en route with the sheriff kills a man in attempting to escape. How could the man be punished for murder, if this construction of our criminal procedure is adopted? He could not be brought within the section above referred to (Rev. Laws, 7256), and as he is not at the state prison he could not be brought within the terms of the section which provides for trial and punishment of prisoners for crimes committed while in prison. Therefore, under this view of our criminal procedure, he would be free from prosecution until the expiration of his sentence, at which time it would be impossible to convict him."

Mr. Bishop, in his *New Criminal Law* (vol. 1, 8th ed., sec. 953), correctly, we believe, states the rule, and fortifies it with abundant authority, when he says: "If one, under an unexpired sentence to imprisonment, is convicted of a second offense, or if there are two or more convictions on which sentence remains to be pronounced, it may direct that each succeeding period of imprisonment shall commence on the termination of that next preceding."

The Court of Appeals, in *Thomas v. People*, 67 N. Y. 226, in discussing the question of whether or not a defendant's rights were being violated because he was tried for a crime while he was still under sentence at the state penitentiary, said: "Convicts, like other persons, are under the protection of the law, and are amenable to its penalties. The laws for the punishment of crimes are general, and apply to all persons in the state. Provision is made (Laws of 1847, c. 4) for taking prisoners out of the state prison for trial upon any indictment found against them. In all cases but such crimes as are punishable with death, there is no practical difficulty, as the sentence in any case may provide that the term shall commence after the expiration of the former term. (1 Bishop on Crim. Law, 5th ed., sec. 953.) Even in such cases, if the sentence should go into immediate effect, it is not apparent how any right of the prisoner would be violated, or what ground of complaint he would have. It certainly would be no detriment to him if he could serve out both sentences by one imprisonment. But in the case of a conviction for murder in the first degree the court is required to proceed and pass sentence which must be executed in not less than four and no more than eight weeks thereafter. (2 R. S. 658.) It matters not whether this law is directory or mandatory. It is the duty of the court to obey it; and it follows that neither the prisoner's rights nor the laws were violated in the sentence passed in this case. To hold otherwise would give a life convict unlimited license to murder without further punishment."

The legislature of our state, as in other states, provides a criminal procedure whereby the accused shall be brought to trial, and has endeavored, through the adoption of the common law, to provide against the possibility of a criminal avoiding punishment for any acts made criminal under our statutory laws or by reason of the common law. See sections 5474 and 6827, Revised Laws of Nevada. Among other sections it has provided that: "Every person, whether an inhabitant of this state, or any other state, or of a territory or district of the United

States, is liable to punishment by the laws of this state for a public offense committed by him therein, except where it is by law cognizable exclusively in the courts of the United States." (Rev. Laws, 6908.)

"There is no limitation of the time within which a prosecution for murder must be commenced. It may be commenced at any time after the death of the person killed." (Rev. Laws, 6921.)

"When it is necessary for any purpose to have a person who is in prison in any part of the state, brought before a court of criminal jurisdiction, an order for that purpose may be made by the court, and the order shall be executed by the sheriff of the county where it is made." (Rev. Laws, 7459.)

These three sections appear conclusively to our mind to disclose the legislative intent that there will be no exemption allowed to convicts, because of prior conviction, from preventing their being brought to the bar of justice for another offense while serving sentences for other crimes, if the prosecuting authorities desire to invoke the legal machinery of our state. By virtue of section 1908 "every person * * * shall be liable to punishment * * * for a public offense committed by him therein," and by virtue of section 6921 "there is no limitation of the time within which a prosecution for murder must be commenced, and by virtue of section 7459, "when it is necessary *for any purpose* to have a person who is in prison in any part of the state brought before a court of criminal jurisdiction, an order for that purpose may be made. * * *"

The petitioner is regularly indicted for murder, and a court of competent jurisdiction has ordered his presence for trial, and we can see nothing in the law, or as a matter of justice, which would preclude a convicted murderer, serving a life sentence, from being tried on another indictment for murder, if the law is properly complied with in bringing the accused to the bar of justice, such as appears to have been done in the present case. When the legislature stated in section 7459,

Revised Laws of Nevada, "when it is necessary *for any purpose* to have a person who is in prison in any part of the state brought before a court of criminal jurisdiction, an order for that purpose may be made by the court, and the order shall be executed by the sheriff of the county where it is made," it meant in its judgment that every person confined in prison could be brought before a court of competent jurisdiction for the purpose of trying him for another offense, if the order of the court so adjudged. (*Willard v. Superior Court*, 82 Cal. 461, 22 Pac. 1120; *Ex Parte McGuire*, 135 Cal. 342, 67 Pac. 327, 87 Am. St. Rep. 105.)

The Court of Criminal Appeals of Texas in *Gaines v. State*, 53 S. W. 624, speaking on this point, said: "Appellant excepted to the action of the court in having him brought from the penitentiary at Rusk (he being confined there on another case) to stand his trial in this case, it being contended that it was not competent for the state to do this. *There is nothing in this contention. While we know of no procedure authorized by legislation to bring a defendant from the penitentiary to some court for trial in another case, yet there is no law to the contrary, and such has been the usual practice; and we fail to see how a defendant can be heard to complain that the penitentiary authorities surrendered him to the local authorities for trial on some indictment pending against him.* The legislature has authorized the penitentiary board to make certain rules in regard to the conduct of the convicts confined and under their charge, and we understand the prison authorities have provided a rule recognizing the authority of district judges to issue writs for prisoners confined in the penitentiary to be brought before the court for trial in any case that may be pending against them. This would seem to be sufficient authority to bring the prisoner before the court. At any rate, in the absence of some express provision prohibiting this, we fail to see how the prisoner can complain. The constitution guarantees him a speedy trial, and at his request he would be entitled to be tried in cases pending against him, although

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he might be confined in the penitentiary. On the other hand, if he should be serving a term of punishment in the penitentiary that extended over a number of years, and at the same time an indictment should be pending against him for some graver offense—it might be rape or murder—there would be no means to bring him to trial until the sentence in the case which he was serving had terminated, and perhaps in the meantime the witnesses against him might die or be so scattered as that a prosecution could not be maintained by the state.”

It will be observed that there was no statutory provision for the removal of a prisoner in Texas to the local authorities pending his trial, while, on the contrary, we have an express statutory provision; yet the court in *Gaines v. State, supra*, rightly held that, where there was no legislative authority opposed to it, it was in consonance with justice and the fundamental principles of our criminal jurisprudence to bring before the bar of justice those accused of crime, to the end that they may be cleared if innocent, and convicted if guilty.

We cannot find any statutory authority in this state prohibiting the trial of a prisoner imprisoned for a crime committed before imprisonment, nor has any been drawn to our attention; but to the contrary, as previously stated, section 7459 of the Revised Laws expressly provides for the bringing of an incarcerated convict to court for trial.

The Supreme Court of Utah, in *People v. Flynn*, 7 Utah, 378, 26 Pac. 1114, in passing upon the point of whether a convict, while imprisoned for a crime committed before imprisonment, could be tried pending his incarceration, said: “The next question presented by counsel for the defendant is that the defendant had been attainted of felony, and was serving a two-year sentence in the penitentiary, previously imposed by the court, and that such period had not yet expired when this indictment was found and trial had, and that the court had no jurisdiction over the subject-matter or the person of the defendant. Section 4749, Comp. Laws, 1888,

provides that 'a sentence of imprisonment in the penitentiary for any term less than life suspends all civil rights of the person so sentenced, and forfeits all public offices, and all private trusts, authority, or power during such imprisonment.' In California, under a similar statute, it is held (*In re Nerac*, 35 Cal. 392, 95 Am. Dec. 111) that a creditor whose debtor is imprisoned in the penitentiary for a term less than life may sue and subject the property of such debtor to the satisfaction of his debt during the term of his imprisonment, and that the person so sentenced is not dead in law; that his civil rights in some matters are merely suspended, but that the rights of his creditors to sue and recover judgment against him are not suspended (*Phelps v. Phelps*, 7 Paige, 150), and that the forfeitures and disabilities imposed by the common law upon persons attainted of felony are not known in this country; that no consequences follow a conviction of felony, except those declared by statute. It was early held in England that persons convicted of felony, and thereby attainted, might plead the same in bar to a subsequent prosecution for any other felony, whether committed before or after the first conviction, for the reason that by his first attaint his possessions were forfeited, his blood corrupted, and he became dead in law; therefore any further conviction or attaint would be fruitless. (4 Bl. Comm. 336; 2 Hale, P. C. 250; 1 Chit. Crim. Law, 464.) This same doctrine was carried out in the case of *Crenshaw v. State*, 1 Mart. & Y. 122, 17 Am. Dec. 788, wherein it is held that a conviction, judgment, and execution upon one indictment for a felony not capital is a bar to all other indictments for felonies not capital, committed previous to such convictions. The doctrine, however, has seldom been followed in the United States, and the above case, though not expressly overruled, seems to be the only adjudication in this country, recognizing this doctrine. Bishop, in his Criminal Law (vol. 1, sec. 898), says: 'It was a doctrine of the English law, at the time when this country was settled, that as a general

rule, to which there were few exceptions, a person attainted for one felony could not be prosecuted criminally for another. But this doctrine, though recognized in one or two American cases, is not usually followed in this country. In England it was long abolished by an act of parliament.' In *Hawkins v. State*, 1 Port. (Ala.) 475, 27 Am. Dec. 641, the court holds that neither a conviction nor pardon for any particular offense can, in that state, operate as a bar or discharge of any other distinct offense; and it is now generally conceded throughout the United States that the doctrine that a conviction for another distinct felony, committed either before or after the first conviction, or while the criminal is serving out his sentence thereon, does not prevail in this country, and is as repugnant to the established principles of modern criminal law as it is supported by reason. (*Rex v. Vandercomb*, 1 Lead. Crim. Cas. 528; Archb. Crim. Pr., Pom. Notes, 350; *State v. Commissioners*, 6 N. C. 371; *State v. McCarty*, 1 Bay, S. C. 334; 1 Bish. Crim. Law, secs. 731-884, 898, 953.) Again, referring to Bishop's Criminal Law, the writer lays down the rule to be that, 'when a prisoner, under an unexpired sentence of imprisonment, is convicted of a second offense, or when there are two or more convictions on which sentence remains to be pronounced, the judgment may direct that each succeeding period of imprisonment shall commence on the termination of the period next preceding.' (For authorities here cited, see page 115.) In the case of *People v. Majors*, reported in 65 Cal. 138, 3 Pac. 597, 52 Am. Rep. 295, it is held that a person may be tried and convicted for the crime of murder, notwithstanding he is at the time of the trial and sentence serving out a previous sentence of life imprisonment for another murder, committed at the same time, and imposed by another court. So, in the case of *People v. Hong Ah Duck*, 61 Cal. 387, it was held that, on a trial for murder, it was competent for the prosecution to show that at the time of the homicide the defendant was a convict in the penitentiary, serving out a life sentence,

and that the homicide was committed while so imprisoned; the object being to give the jury to understand that if they found the defendant guilty of murder in the first degree, with a recommendation to imprisonment for life, and by said verdict fixed the imprisonment for life, the punishment would be no more than the defendant was then undergoing under a former conviction, and that such a verdict would be no punishment whatever, unless the jury made it punishable with death. In this territory there is no statute exempting a convict from punishment for an offense committed by him while serving out his term of punishment. Our general penal laws include all persons within their scope. The criminal is protected by the law, and is made amenable to it, while in prison, for any term of imprisonment. The statute of limitations requires prosecution for all felonies, other than murder, to be commenced within four years after the commission of the offense (Comp. Laws, 1888, sec. 4830), and, if not so commenced, the prosecution is barred. It is true an indictment may be found before the expiration of the statutory limit, and the prisoner may be arrested and tried thereon after the expiration of his term of imprisonment; but it is not difficult to discover that this practice, if inaugurated, would not only greatly delay the execution of public justice, but in many instances would prevent a speedy trial that is guaranteed to all accused persons. It would impair the necessary discipline required in public prisons, and, in a measure, become a shield and protection to the criminals therein confined."

The Supreme Court of Washington, in *Clifford v. Dryden*, *supra*, sustaining the construction we give our statutes bearing on this issue, that the law which provides for a trial and punishment of those who violate the laws applies equally to those serving sentence as well as others, properly observed: "It is the contention of the appellant that the superior court of Whitman County did not have authority to make the order requiring the sheriff to proceed to the penitentiary and apprehend him while in the

custody of the warden; that, said order being void, no jurisdiction was ever acquired by the court to try the cause; and that, therefore, the judgment of June 13, 1901, is also void. No authorities are submitted by the appellant, but the sole argument is that the defendant could not have a fair trial, by reason of the fact that the jury, knowing him to be a convict, would be prejudiced against him to such an extent that it could not do him justice. There is nothing in the record to indicate that there was anything in the appearance of the appellant at the trial which would suggest to the jury the fact that he was a convict. But, even if there were, that would simply be both the fault and the misfortune of the defendant, and should not be allowed to interfere with the regular and orderly administration of justice. The presumption must be that he was rightfully convicted in the preceding case. Therefore the position in which he finds himself before the jury is a position necessitated by his own wrong, and he cannot plead it for the purpose of postponing or even defeating a legitimate prosecution. It might very reasonably happen, considering the difficulty of preserving and perpetuating the testimony, that, if the second trial were postponed until after a lengthy sentence had been served, it would result in a failure of justice. In this case, it is true, the sentence was a short one; but the principle contended for will apply as if the sentence were a long one.

* * * The law provides generally for the trial and punishment of its violator, and, unless such violator is excepted from such general provisions, even though he may be an inmate of a penitentiary, he has no just cause for complaint."

The Supreme Court of Maryland, holding adversely to the position of petitioner on the issue under consideration, in *Rigor v. State*, 101 Md. 465 (61 Atl. 631, 4 Ann. Cas. 719), says: "We now come to the grounds of error assigned, or intended to be assigned, in the petition upon which the record was transmitted to this court. It is contended that a writ of *habeas corpus* cannot be used to bring a convict from the penitentiary into the criminal

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court for trial upon an indictment there pending against him, while he is serving a sentence of imprisonment under a conviction of felony entered against him in another court of the state; and the error complained of is that the criminal court refused to quash the writ of *habeas corpus*. Assuming, for the moment, that this court has authority to review the ruling thus made, there can be no doubt as to the correctness of the court's action. A writ of *habeas corpus* will bring a convict from the penitentiary into court, not for the purpose of having the cause of his detention inquired into, but either because he may be needed as a witness, or because a pending indictment against him ought to be heard and determined. The penitentiary is not a place of sanctuary, and an incarcerated convict ought not to enjoy an immunity from trial merely because he is undergoing punishment on some earlier judgment of guilt. Why should there be a delay in bringing to trial, on an indictment pending against him, a convict who has not yet completed the service of a previous sentence? No reason can be suggested for such a delay, in the case of a convict adjudged guilty of some other offense and actually in execution of a sentence thereunder, that does not apply equally to an individual who has been indicted, but has not yet been tried. The situation of the two is identical, except for the single circumstance that in the first instance the criminal who has more frequently violated the law has been tried and convicted for some of his offenses, whilst the other has not. It is not the policy of the law to encourage the commission of crime. Delay in administering the criminal law and in inflicting punishment promotes crimes, as observation and common experience abundantly demonstrate. And if the courts should hold that one already convicted and actually incarcerated under sentence could not be brought before the court on a writ of *habeas corpus*, and tried for some other offense, until the expiration of the first sentence, a temptation to commit a crime for the express purpose of escaping altogether, or at least of deferring

punishment for a previous one, would be held out to the evil-minded and depraved. Suppose, for instance, that a homicide had been committed, and the assassin has escaped, and that for the time being a suspicion does not point to him, but is directed toward another. Suppose that the real criminal returns to the scene of the murder, and in the vicinity commits a larceny, and is arrested therefor, and pleads guilty, and is sentenced to confinement for eight or ten years in the penitentiary, and that, after beginning to serve out that sentence, evidence is discovered which indicates that he is the murderer. Suppose, further, he should, when confronted with the evidence inculcating him, confess his guilt, and that he should then be indicted for the crime of murder. Would any court hesitate to issue a writ of *habeas corpus*, directed to the warden of the penitentiary, requiring him to produce the convict, so that the latter might be put upon trial for the capital offense? Can it be possible that the court would be so hopelessly impotent, in such circumstances, as to be unable to do anything until the expiration of the sentence of eight or ten years, by which time the main witnesses might be dead, and the ends of justice might be defeated? And yet, if the contention made in the case at bar is sound, the arm of the criminal law would be paralyzed—not a step could be taken toward prosecuting him so long as the convict remained sheltered within the walls of the penitentiary. That is not the law. The criminal court had jurisdiction to bring the plaintiff in error before it under a writ of *habeas corpus* and to place him on trial under the indictment there pending against him. (*Re Wetton*, 1 Comp. & Jarvis.) In *Regina v. Day*, 3 F. & F. 526, it was held that the court will not grant an application for *habeas corpus* to remove a prisoner from jail, where he is undergoing sentence, in order to take him before a magistrate in another county, to prefer charge against him, but will grant a *habeas corpus* to bring him up for trial on a true bill being found against him at the assizes on that charge. (*State v. Wilson*, 38 Conn. 126; *People*

v. *Flynn*, 7 Utah, 378, 26 Pac. 1114; *Ex Parte Ah Men*, 77 Cal. 202, 19 Pac. 380, 11 Am. St. Rep. 263; 15 Am. & Eng. Ency. 2d ed. 191.)”

The Supreme Court of California, in consonance with the construction we place upon our statute, which is similar in California to the one in this state, on the question of whether or not one serving sentence under former conviction can be tried while incarcerated, in the case of *People v. Hong Ah Duck*, 61 Cal. 387, sustains the construction we are making, and recognizes the right to try a prisoner confined in the state prison for a crime committed, and even went so far as to approve of the admission of the evidence of the defendant, proving him to be an inmate of the state prison serving life imprisonment, so as to show the jury, unless they fixed the verdict of the second case at death, it would be in effect no punishment at all.

Again, the Supreme Court of California, in the case of *People v. Majors*, *supra*, which was a case very similar to the present one, in that a double murder had been committed, and the prisoner confined in the penitentiary for life, upon the issue as to whether or not he could be tried on another indictment of murder while so serving his life sentence, the defendant interposed an objection to the jurisdiction of the court to proceed with the second trial because of his present incarceration. The court answered this objection by citing the case of *People v. Hong Ah Duck*, *supra*, wherein the court sustained the right to try the defendant on another charge while serving a term on a former conviction.

We have examined with care the very able and painstaking brief of counsel for petitioner, and the authorities cited in support of his many ingenious positions taken in support of his theories; but we believe the better reasoning is with those cases we have cited on the construction we have placed on the statute of this state bearing on this issue, and that the state has the unquestioned right to proceed to try petitioner on indictment No. 2, and in the event of conviction, if the maximum sentence of the

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law decreeing death is imposed, to carry the same into execution. (*Peri v. People*, 65 Ill. 17; *Gillespie v. People*, 176 Ill. 238, 52 N. E. 250; *Huffaker v. Com.*, 124 Ky. 115, 98 S. W. 331, 14 Ann. Cas. 487; *State v. Wilson*, 38 Conn. 126; *Dudley v. State*, 55 W. Va. 472, 47 S. E. 285; *State v. Keefe*, 17 Wyo. 227; 98 Pac. 122, 22 L. R. A. (N. S.) 896, 17 Ann. Cas. 161; *In re Garvey*, 7 Colo. 502, 4 Pac. 758; 9 Cyc. 876; *Clifford v. Dryden*, 31 Wash. 545, 72 Pac. 97; *Thomas v. People*, 67 N. Y. 226; Bishop, New Criminal Law, 8th ed. vol. 1, sec. 953; *Gaines v. State*, 53 S. W. 624; *People v. Flynn*, 7 Utah, 378, 26 Pac. 1114; *People v. Majors*, 65 Cal. 138, 3 Pac. 597, 52 Am. Rep. 295; *People v. Hong Ah Duck*, 61 Cal. 387; *Rigor v. State*, 101 Md. 465, 61 Atl. 631, 4 Ann. Cas. 719; *U. S. v. Farrell*, 5 Cranch, C. C. 311, Fed. Cas. No. 15,074; *Russell v. Com.*, 7 Serg. & R. 489; *Com. v. Leath*, 3 Va. 151; *Howard v. U. S.*, 75 Fed. 986, 21 C. C. A. 586, 34 L. R. A. 509; *Rex v. Wilkes*, 4 Burr. 2576.)

[2, 3] To the second main contention of counsel that petitioner is entitled to his discharge under indictment No. 2, because he was not accorded a speedy trial, we can neither concur nor give him any comfort, for the reason that the record does not disclose that the petitioner's rights in this respect were ever violated. This court has uniformly held that a continuance in a criminal case is within the discretion of the court, and unless there is an abuse of its discretion its actions will be sustained. In the present case we observe no abuse of discretion by the court which can be said to be prejudicial to petitioner's rights. (*State v. Chapman*, 6 Nev. 320; *State v. Rosemurgy*, 9 Nev. 308.) The stipulation of facts between counsel, cited heretofore, discloses that petitioner interposed no objection to the continuance of the setting of the murder charge under the second indictment. Among other facts it is agreed in said stipulation that "at the time of the making of the order by the judge of the Sixth judicial district court, Humboldt County, whereby indictment No. 2 was continued for further setting, the petitioner made no objection to the making of said order."

The fact that no objection was made by petitioner to the continuance and the order setting the case, and that the record does not disclose that he ever made an application for a speedy trial, or any trial whatever, on indictment No. 2, places him in a position wherein now he cannot complain. (*Gillespie v. People*, 176 Ill. 238, 52 N. E. 250; *Dudley v. State*, 55 W. Va. 472, 47 S. E. 285; *State v. Keefe*, 17 Wyo. 227, 98 Pac. 122, 22 L. R. A. (N. S.) 896, 17 Ann. Cas. 161.)

This court had occasion to consider what is a speedy trial under the constitutional guaranty and the provisions of section 582 of the old criminal practice act (Comp. Laws, 4547, as modified, Rev. Laws, 7396) in the case of *Ex Parte Stanley*, 4 Nev. 113. The rule therein stated was followed in *State v. McClear*, 11 Nev. 56, and in *Ex Parte Larkin*, 11 Nev. 94. The rule enunciated in the Stanley case has also been cited with approval by other courts. (*State v. Keefe, supra*; *State v. Wear*, 145 Mo. 218, 46 S. W. 1099; *State v. Goddard*, 162 Mo. 223, 62 S. W. 697; *Ex Parte State*, 76 Ala. 486; *U. S. v. Fox*, 3 Mont. 517.)

[4] The agreed state of facts discloses that a trial on indictment No. 2 could not be had at the May term or session of the district court in and for Humboldt County, especially in view of the fact that a change of venue was deemed necessary in the case of indictment No. 1. Why both cases were not removed at the same time does not appear. It does appear that the next term or session of court wherein trials could have been had in Humboldt County was in October, 1911, and at that term the case on indictment No. 2 was called, and the case set for trial, and subsequently removed to Washoe County on change of venue.

[5] It was held in *Gillespie v. People, supra*, that the statute does not apply while a defendant is in prison serving a sentence upon another charge, and to the same effect is *State v. Brophy*, 8 Ohio Dec. 698. We think this is the law, for the reason the rule does not exist in such cases. Undoubtedly a defendant, serving a sentence on another charge, has the right to demand that he be tried

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on all indictments pending against him, and a refusal to try him might enable him to successfully invoke the statute. (*State v. Keefe, supra; Dudley v. State, supra.*)

For the foregoing reasons, the writ is denied, and the proceeding in this behalf dismissed.

[Nos. 1978, 1989, 1991]**EUREKA COUNTY BANK HABEAS CORPUS CASES.**

RE APPLICATIONS OF OSCAR J. SMITH AND W. E. GRIFFIN; OSCAR J. SMITH, W. E. GRIFFIN, H. F. GOLDING, AND C. H. GORMAN; AND JOHN HANCOCK.

1. BANKING BUSINESS—REGULATION—CONSTITUTIONALITY—POLICE POWER.

The legislature may regulate the banking business, and penal statutes safeguarding the business of banking are applicable to banks organized previous to, as well as to banks organized after, their passage.

2. HABEAS CORPUS—DISCHARGE FROM ARREST UNDER WARRANT OR INDICTMENT—EXCESS OF JURISDICTION—CASE NOT ALLOWED BY LAW—WANT OF PROBABLE CAUSE—TAKING EVIDENCE.

Under the clear provisions of the *habeas corpus* act (Rev. Laws, 6239, 6241, 6242, 6243, 6245), directing that the judge before whom a writ of *habeas corpus* is returned, shall "proceed to hear and examine the return, and such other matters as may be properly submitted," and "in a summary way to hear such allegations and proof as may be produced against such imprisonment or detention, or in favor of the same, and to dispose of such parties as the justice of the case may require"; and that "such judge shall have full power and authority to require and compel the attendance of witnesses by process of subpoena and attachment, and to do and perform all other acts and things necessary to a full and fair hearing and determination of the case," and "to discharge such party if no legal cause be shown"; that "if it appears on the return of the writ that the prisoner is in custody by virtue of process from any court * * *, or judge or officer thereof, such prisoner may be discharged, * * * first, when the jurisdiction of such court or officer has been exceeded * * *; fourth, when the process, though proper in form, has been issued in a case not allowed by law * * *; sixth, where a party has been committed on a criminal charge without reasonable or probable cause," the warrant of a committing magistrate and

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the bench warrant under an indictment are not final judgments, nor conclusive, and the judge or court hearing an application for a writ of *habeas corpus* may take or hear evidence against the warrants and indictment, and may discharge the accused when the magistrate, grand jury or court have exceeded their jurisdiction, when the process has been issued in a case not allowed by law, or when the party has been committed on a criminal charge without reasonable or probable cause.

3. **HABEAS CORPUS—FINAL JUDGMENT OF COMPETENT COURT OF CRIMINAL JURISDICTION—EVIDENCE—DISCHARGE OF ACCUSED.**

The provision in Rev. Laws, 6244, that it shall be the duty of the "judge to remand the party if it shall appear that he is detained in custody by virtue of a final judgment or decree of any competent court of criminal jurisdiction," implies that he may be discharged in other cases if it appears from the evidence that there is no ground for detaining him. The warrant of the committing magistrate and the bench warrants issued under the indictment are not final judgments, nor conclusive under the provisions of the *habeas corpus* act.

4. **WANT OF PROBABLE CAUSE—WHEN PERSON BOUND OVER WILL BE DISCHARGED.**

It is a well-recognized rule that a person charged with felony and bound over by a committing magistrate will be discharged when there is no probable cause for believing that he is guilty of any offense.

5. **INDICTMENT—BENCH WARRANT—WHEN ACCUSED ENTITLED TO DISCHARGE.**

Under the provisions of the *habeas corpus* act, persons held under an indictment and bench warrant issued under it, are entitled to be released when it is undisputed and clearly appears that they have committed no act which the law declares to be criminal, or if they are held in a case not allowed by law.

6. **CONCLUSIVENESS OF INDICTMENT ON HABEAS CORPUS PROCEEDINGS—LACK OF EVIDENCE TO SUSTAIN INDICTMENT OR SHOW GUILT—BURDEN OF SHOWING LACK OF EVIDENCE.**

The indictment is strong presumptive evidence of the truth of the allegations, but it is not conclusive against the objection that the court is without jurisdiction; and the court may consider the evidence and the real facts, the burden of showing which, clearly, in order to overcome the indictment, is upon the petitioners. Unless it appears that no evidence for the consideration of the trial jury can be supplied, indicating that the accused committed the crimes for which they are charged, or if the state can produce any evidence which would support the material allegations of the indictments and sustain a conviction, the indictments would be conclusive to the extent of requiring remanding to custody of the accused for trial, no matter how much evidence the accused may have tending to prove innocence.

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7. LACK OF CRIMINAL JURISDICTION IF ACTS DO NOT CONSTITUTE CRIME.

Acts which the law declares to be criminal are the only ones which constitute crime, or for which a criminal court has jurisdiction to try an accused person. Prosecuting officers and law-abiding citizens cannot properly demand the conviction or prosecution of persons for the commission of other acts. If they could, no citizen, not even the law-abiding, would be safe. The district court is without original jurisdiction of misdemeanors triable in the justice's court, and the justice's court is without jurisdiction to try felonies which are triable only in the district court, and both are without jurisdiction to try an accused person for acts which are neither felonies nor misdemeanors, and which do not constitute crime. When a court attempts to punish for the commission of acts which are not criminal by law it goes beyond its jurisdiction into the domain of legislation, which is committed exclusively to another department of government.

8. GRAND JURY—POWER TO INDICT.

It is the commission of an offense within the county which gives the grand jury authority to indict. Under Rev. Laws, 7020, "the grand jury must inquire into all public offenses committed and triable in the jurisdiction of the court." Under sections 7012 and 7013 the foreman and members of the grand jury are required to take an oath to present all offenses "committed and triable within this county of which you shall have or can obtain legal evidence"; and under section 7026, indictment should be found "when all the evidence * * * taken together is such as * * * would, if unexplained or uncontradicted, warrant a conviction by the trial jury." Under these statutory provisions the grand jury has not power to indict without evidence of the commission of an act constituting a criminal offense in the county, which would sustain a conviction by a trial jury.

9. PENAL LAWS—CERTAINTY.

Criminal laws must be plainly written, so that every person may have an opportunity to know with certainty what acts or omissions constitute crime.

10. HABEAS CORPUS—WRIT NOT DESIGNED TO INTERFERE WITH JURISDICTION OF COURTS OR MAGISTRATES, OR TO TAKE THE PLACE OF APPEAL—WHEN WILL ISSUE.

The writ of *habeas corpus* is not designed to interfere with the jurisdiction of any court, nor with the functions of committing magistrates or trial judges in determining as to the guilt of persons charged against whom there is evidence indicating that they have broken the law, nor is it designed to take the place of an appeal. It will seldom issue, but under the constitutional provisions guaranteeing liberty to the citizens and giving the right to the writ, it ought to issue in every case for the discharge of persons accused when it is clear and undisputed that the acts for which they are held are not criminal.

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11. DISCHARGE UNDER A WRIT OF HABEAS CORPUS—FAILURE OF STATE TO DENY OR DISPROVE EVIDENCE THAT PETITIONERS WERE NOT IN THE COUNTY AND COMMITTED NO OFFENSE.

When on the hearing of the application for the writ of *habeas corpus* the prosecuting witness testifies that he does not know that certain of the petitioners were in Eureka County, and there is positive evidence on their behalf, uncontradicted, that they were not there, and the attorney for the state declined to make any admission, a failure to deny or offer any testimony against the evidence submitted by the petitioners, or to claim that the state could produce any contrary evidence upon a trial, is equivalent to an admission. In view of this, and other undisputed evidence that the petitioners committed no act which is made criminal and punishable in Eureka County, they are entitled to be restored to liberty under the constitutional right to the writ of *habeas corpus*.

12. LIABILITY OF ABSENT OFFICER OF INCORPORATED BANK RECEIVING DEPOSITS—ASSENT—CONNIVANCE.

Where, under indictments and bench warrants under a statute making it a felony for any officer, director or person to accept or receive a deposit in any bank, when he knows or has good reason to know that the bank is insolvent, or for permitting, conniving at or assenting to the reception of deposits, it is sought to hold and punish directors and officers of a bank who are not residing in the county, and were not at the bank, and did nothing in regard to the receipt of deposits, on the assumption that, because they were such directors and officers, the inference would follow that they were receiving the deposits, assenting to and conniving at the reception of deposits which were being received by the bank through its cashier, they are entitled to be discharged because the statute nowhere by its terms provides any penalty against petitioners or persons for merely acting as directors or officers of a bank, whether solvent or insolvent, or when receiving deposits and insolvent, except officers or persons actually receiving deposits for the bank, knowing or having good reason to know that it is insolvent.

13. RECEIPT OF DEPOSITS BY INCORPORATED BANK—KNOWLEDGE OF INSOLVENCY.

The receipt in a private bank of a deposit by the teller is the receipt by the private banker, because he is the principal, the teller, the agent, and the deposit is the banker's private property; but the receipt of a deposit in an incorporated bank by the teller is a receipt by the corporation and the deposit becomes the property of the incorporated bank, not of the teller or other officers of the bank; and the teller or cashier actually receiving the deposit for an incorporated bank is not guilty of felony unless he knows, or has good reason to know, that the bank is insolvent, and he may not have the same knowledge regarding the value of the assets and the insolvency of the bank as the directors.

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14. POWERS OF DIRECTOR OR OFFICER TO CLOSE INCORPORATED BANK.

A director or officer, when he is not specially authorized by the board of directors or stockholders, is not empowered to prevent the reception of deposits or to close a bank which has long been doing business and is receiving deposits, merely because he is such officer.

15. OFFICER WITHOUT POWER TO CLOSE BANK—ASSENT TO DEPOSIT.

Under the provisions of the statute, that any bank officer having authority to close the bank or to prevent the reception of deposits, who does not exercise such authority when he knows the bank to be insolvent, shall be deemed to have assented to the reception of deposits, the officer is not guilty of assenting to the reception of deposits merely because he is such officer, when he has not been authorized to close the bank nor to prevent the reception of deposits, and is absent and does nothing in regard to the deposits. Under the statute, the assenting to the reception of deposits implies the power to withhold assent; and an officer who is without this power, and is absent and does not act in regard to the deposit, cannot be held guilty of assenting to the reception of a deposit.

16. NEW ALLEGATIONS IN NEW INDICTMENTS WITHOUT EVIDENCE; WHEN DO NOT GIVE JURISDICTION.

Bringing new indictments after petitioners have been discharged on *habeas corpus*, and adding or omitting words in the charging part which cannot be supported by any evidence, does not bring the accused within the jurisdiction of the court, if evidence be heard as directed by the statute and the undisputed facts show that petitioners were not within the jurisdiction of the court and committed no act which the legislature has made punishable. Alleging that they received deposits when the evidence is clear that they were not in the county, nor at the bank, does not give the court jurisdiction to try them, when the statute provides no penalty for their acting as directors and officers of the bank, even if it was insolvent, and when the *habeas corpus* act directs that testimony be heard and petitioners discharged if it is sought to hold them in a case not provided by law.

17. SECOND INDICTMENT—PRESUMPTION—PROOF OF LACK OF EVIDENCE TO SUSTAIN ALLEGATION.

The presumption that the allegations of an indictment, and of a second indictment, are correct, in the absence of any testimony, may be overcome by clear proof on the part of the accused, uncontradicted by the state, indicating that there is not evidence to sustain the material allegations.

18. LACK OF EVIDENCE AND JURISDICTION—DISCHARGE BEFORE TRIAL TO PREVENT INJUSTICE.

Although no expense, however great, ought to prevent the trial of persons properly charged, against whom there is evidence to sustain a conviction, if it is clear that there is no evidence to sustain a conviction for any offense within the

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jurisdiction of the court, the accused ought to be discharged before trial to prevent injustice, hardship and expense to them and to the county.

19. QUASHING INDICTMENT—LATENT DEFECT.

Upon a motion to quash, a court can go behind an indictment regular upon its face and determine that it is void for any latent defect.

20. QUASHING INDICTMENT FOR LACK OF EVIDENCE OR FOR PREJUDICE.

In extreme cases, when the court can see that the finding of an indictment is based upon such insufficient evidence as to indicate that the indictment resulted from prejudice, or was found in wilful disregard of the rights of the accused, the court should quash the indictment.

21. GENERAL BANKING ACT OF 1909—HOW FAR REPEALED BY GENERAL ACT OF 1911.

The banking act of March 22, 1911, being a general and comprehensive act, working over and covering most of the features of the general banking act of March 24, 1909, and evidently intended as a substitute for it, repeals the provisions of that act by implication, except as specifically continued in force.

22. REPEAL OF PROVISIONS IN BANKING ACT OF 1909 PENALIZING PUBLICATION OF FALSE STATEMENT.

Section 16 of the general banking act of March 22, 1911 (Stats. 1911, p. 297; Rev. Laws, 631), having remodeled and carried over most of the provisions of section 22 of the general banking act of March 24, 1909 (Stats. 1909, p. 257), and having omitted the provision of section 22 making it a felony to publish any false statement of the amount of the assets and liabilities of a banking corporation, and the later act being a general and comprehensive one, working over the provisions of the earlier act, the provision making it a felony to publish such a statement is repealed and no longer in force.

23. LACK OF JURISDICTION TO INDICT UNDER REPEALED STATUTE—RELEASE ON HABEAS CORPUS.

The court is without jurisdiction to hold for trial and convict the accused under the provision of an act which has been repealed, and when held for an act which is no longer criminal they are entitled to be discharged upon *habeas corpus*.

24. SWEARING TO FALSE REPORT, OR OTHER CRIMINAL ACT, WHERE PUNISHABLE.

Knowingly subscribing or swearing to a false report and other acts by an officer, director, proprietor, agent or clerk of a bank are punishable in the county where the report was subscribed or sworn to or the acts committed.

25. ASSISTANCE OF BLIND COMMISSIONER IN DRAWING GRAND JURY—VALIDITY OF INDICTMENT—PRESUMPTION THAT OFFICERS DO DUTY.

The fact that a county commissioner who was blind assisted

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in selecting the members of the grand jury is not a ground for setting aside an indictment. As with officers, the presumption is that he did his duty, and, in the absence of any showing to the contrary, it must be assumed that the clerk and judge in drawing and certifying to the grand jury, did theirs.

26. **PREJUDICE OF DISTRICT JUDGE—SETTING ASIDE INDICTMENT ON HABEAS CORPUS.**

Under the contention that denunciation at a public meeting, in the public press, and in court, of the officers of a bank, by the district judge who ordered and assisted in drawing the members of the grand jury and presided at the time the indictments were found is cause for setting them aside: *Held*, that generally the prejudice of the judge or bias of the grand jury is not ground for setting aside indictments by writ of *habeas corpus*. Whether the bias of a judge may be so extreme in any case as to warrant the setting aside of an indictment or discharge on *habeas corpus* of indicted persons on the theory that the constitution entitles the citizen to release in such a case, not determined.

27. **CONSTITUTIONAL QUESTION—WHEN NOT DETERMINED.**

It is the rule that constitutional questions will not be determined unless the determination is necessary for the disposition of the case.

28. **SETTING ASIDE INDICTMENT—BIAS OF GRAND JUROR.**

Under sections 7090 and 7005 of the Revised Laws, the indictment may be set aside by the court in which the defendant is arraigned, upon motion, when the defendant has not been held to answer before the finding of the indictment, on the ground that a state of mind exists upon the part of the grand juror which would prevent him from acting impartially and without prejudice.

ON PETITION FOR REHEARING

29. **HABEAS CORPUS—DISCHARGE—REHEARING.**

After an order in a *habeas corpus* proceeding discharging the prisoner, a rehearing will not be granted, since this would suspend the former order and result in the rearrest of the prisoner, contrary to the express provisions of the *habeas corpus* act, sec. 29 (Rev. Laws, 6254).

Syllabus by TALBOT, J.

ORIGINAL PROCEEDING for a writ of *habeas corpus*.
Petitioners discharged. Petition for rehearing. Denied.

The facts sufficiently appear in the opinion.

James Glynn and Oscar J. Smith, for Petitioners:

Petitioners contend that when the jurisdiction of a court is made to depend upon the existence of certain

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facts, those facts are conditions precedent, and the existence or nonexistence of such facts is always open to inquiry, and that upon a *habeas corpus* all matters pertaining to jurisdiction are proper subjects of inquiry, to be heard and determined from the evidence; and that any fact touching the jurisdiction may be given in evidence. (12 Ency. Pl. & Pr. 120; *Paul v. Armstrong*, 1 Nev. 82.)

In the cases at bar the power of Justice Cromer flows from the provisions of these banking acts, and is dependent upon the existence of the conditions precedent laid down in these acts, and if the conditions did not in fact exist at the time the *corpus delicti* is charged, Cromer was without jurisdiction to issue the warrants, his general statutory jurisdiction over the subject-matter of crimes being insufficient. Courts have, almost invariably, gone behind records, commitments, warrants, indictments, and complaints in *habeas corpus* proceedings to inquire into the question of jurisdiction when such jurisdiction was challenged.

The prisoner has the undoubted right to show that the magistrate acted without authority; and, this is so, notwithstanding the commitment recites the existence of the necessary facts to give jurisdiction. No court or officer can acquire jurisdiction by the mere assertion of it, or by falsely alleging the existence of facts on which jurisdiction depends. (*People v. Cassels*, 5 Hill, 164, 168.)

One arrested under warrant from a magistrate is not obliged to await an examination by the magistrate before suing out a writ of *habeas corpus* to secure his release. (*People, ex rel. Perkins, v. Moss*, 187 N. Y. 410, 80 N. E. 363, 11 L. R. A., N. S., 528; *In re Waterman*, 29 Nev. 288, 292, 293; *Ex Parte Rickelt*, 61 Fed. 203, 205.)

The writ is to remove illegal restraints of every kind. (15 Ency. Law, 160.)

Evidence may be received to show the want of probable cause. (9 Ency. Pl. & Pr. 1053.) See, also, sections 3756, 3762, Comp. Laws.

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Evidence touching prisoner's guilt will sometimes be received. (9 Ency. Pl. & Pr. 1053.)

If the averments of the return are traversed, an issue of facts is formed and upon this issue a trial must be had, the facts determined, and the law applied. (Id. 1052.)

Matters affecting jurisdiction may be examined. (Id. 1060.)

It has never been doubted that the fact of jurisdiction was a proper subject for inquiry in a proceeding of this character, and if such were not the case the simple warrant of a court, however arbitrary and illegal it might be, would constitute a complete answer to the writ. (*In re Corryell*, 22 Cal. 179, 181; *People v. Cassels*, 5 Hill, 164, 168; *People, ex rel. Frey, v. Warden*, 100 N. Y. 20, 24.) See, also, notes to *Commonwealth v. Lecky*, 1 Watts, 66 (Pa.), 26 Am. Dec. 40, 41.

Jurisdictional facts may be established by evidence *aliunde*. (*Ex Parte Kearny*, 55 Cal. 212, 220; *In re Bogart*, 2 Sawy. 296, 401; Brown on Jurisdiction, 54, 280, 293.)

Petitioners challenge the constitutionality of the act of March 13, 1909. It is argued by respondent's attorneys that the supreme court of this state has upheld the constitutionality of the act of March 26, 1907 (Stats. 1907, p. 229), containing similar provisions, and hence that this act of March 24, 1909, is also constitutional; but an examination of the act of March 26, 1907, will show that it provides for a due process of law and is not open to the same objections as this act of March 24, 1909.

The Marymont case holds that the legislature cannot exercise unrestricted powers in dealing with banks.

Have directors power to close a bank without special authority from the stockholders? We insist that the directors have no such power as a board or otherwise unless specifically authorized by the stockholders, and if any such power exists it is implied in a civil statute and cannot be invoked to aid the state in a penal law.

Cleveland H. Baker, Attorney-General, *T. J. McParlin*,

Argument for Respondent

District Attorney of Eureka County, *Lewers & Henderson*, and *Mack, Green, Brown & Heer*, for Respondent:

There is nothing in the banking acts which makes any fact a condition precedent to the jurisdiction of the justice to entertain a complaint which will authorize the justice to issue his warrant, cause the accused to be brought before him, and make inquiry as to the grounds for believing that the accused is guilty of a violation of the statutes.

The conditions precedent to the jurisdiction of Justice Cromer to issue his warrant of arrest were the same in these cases as in all other cases where felony is charged: First, he must have been a magistrate; second, a complaint by proper affidavit setting forth the nature of the charge, etc., must have been filed with him and from said complaint it must have sufficiently appeared that an offense had been committed by some person, triable within his county. (Comp. Laws, 4073; *Sheldon's Lessees v. Norton*, 30 Ohio St. 499; *U. S. v. Arreondo*, 31 U. S. 691, 709; Freeman on Judgments, sec. 118; *Belles v. Miller*, 38 Pac. 1050-1052.)

The charge made, whether by complaint, information or indictment, gives jurisdiction. (*People v. Fahey*, 30 Pac. 1030; *Ex Parte Bell*, 34 Pac. 641; *State v. Evans*, 60 N. W. 433, 434.)

The filing of a proper complaint with the magistrate is the condition precedent to his jurisdiction to issue a warrant. (*In re Eldred*, 1 N. W. 175, 176; *Pardee v. Smith*, 27 Mich. 33, 42, 43; *State v. Carey*, 42 Pac. 371, 372; *State v. Stobie*, 92 S. W. 191, 196, 203; *Phillips v. Welch*, 12 Nev. 158.)

That the writ is used "to remove illegal restraints of every kind" is true. But the legality of the restraint does not depend on the guilt or innocence of the prisoner. Otherwise, every man found innocent by a jury would have been illegally restrained of his liberty and be entitled to maintain an action for false imprisonment.

"Evidence may be received to show the want of probable cause." That is true only after preliminary examina-

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tion and commitment, such evidence in this state being confined to the depositions taken on the preliminary examination by the committing magistrate. (*Ex Parte Allen*, 12 Nev. 87.)

None of the other citations from the Encyclopedia of Pleading and Practice, nor those from Brown on Jurisdiction, when read in connection with the context and the authorities cited in support of the text, will sustain the contention of petitioners that on the hearing of the returns to the writs they are entitled to offer evidence concerning the merits of the charges on which they have been arrested. (*Ex Parte Mahone*, 30 Ala. 49, 50; *Ex Parte Shandies*, 66 Ala. 137.)

It seems to be petitioners' theory that a banker who knows that his bank is insolvent and therefore an unsafe place for a depositor's money, is entitled nevertheless to continue to hold himself out as solvent and to receive deposits, and that such act of reception creates only debts, and that statutes making the reception of deposits under such circumstances crimes, punishable by imprisonment, provide for imprisonment for debt and abridge the immunities of bankers. *Ex Parte Pittman*, 31 Nev. 43, is a complete answer to counsel's contention on these points.

Petitioners also contend that this act of March 13, 1909, established a system of vicarious punishment and makes one man suffer for the offenses of another and thereby denies the equal protection of the laws, overlooking the fact that the bank officer, who is punished for assenting to the reception of a deposit in an insolvent bank, is not punished for the act of the employee receiving the deposit, but for his own failure to exercise his duty to prevent the reception of the deposit when he knows the bank is insolvent.

The only way by which directors as such may exercise their authority to close the bank or prevent the reception of deposits, is by voting at a meeting of the stockholders that the bank shall be closed, or that no more deposits shall be received therein. Hence a director

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who so votes does not fail to exercise such authority as he possesses. The case of a director who by resolution of the board, or by the by-laws of the corporation, was given special authority or made the general manager of the affairs of the bank would stand upon a different footing.

The question, in any particular case, as to whether or not an officer or director did have authority to close the bank and prevent the reception of deposits therein, is an ultimate question of fact, and the allegation that an officer did have such authority is an allegation of ultimate fact, the truth or falsity of which would depend upon the evidence adduced to prove the existence of such authority. That evidence would vary with the particular circumstances of the case.

In asserting that there is no authority anywhere except in the stockholders to close a bank or prevent the reception of deposits, when it is in failing circumstances, the petitioners ungratefully turn their backs upon the reasoning of the supreme court of this state in *Ex Parte Smith*, 111 Pac. 930.

Counsel for petitioners would have the court think, that on a prosecution under the act of March 13, 1909, the question of whether or not the bank was insolvent or in failing circumstances would be dependent upon the action of the bank examiner and the state banking board. But the question as to whether or not the bank was insolvent would in such a case be a question of fact to be determined by the evidence adduced on the trial.

Corporations are subject to the police powers of the state as to regulation and control in the interest of the public. (Tiedman on Limitation of Police Powers, 576; *Chicago Life Insurance Company v. Needles*, 28 L. Ed. 574; *Venner v. Chicago Electric Ry. Co.*, 92 N. W. 646; *Commonwealth v. Bank*, 32 Am. Dec. 290.) The banking act of March 24, 1909, clearly indicates that that act is a general act for the alteration of the charters of all banking corporations theretofore organized. This is a valid exercise of the powers reserved by the constitution.

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(*Miller v. State*, 15 Wall. 478; 21 L. Ed. 98; *Spring Valley Water Works v. Schottler*, 110 U. S. 347, 28 L. Ed. 173; *Noble State Bank v. Haskell*, 91 Pac. 591.)

We maintain that the constitutionality of these statutes is really immaterial to a decision of the question before the court. If the respondent arrested the petitioners under and by virtue of one valid warrant, it is immaterial whether or not his other warrants are valid. (*Ex Parte Ryan*, 10 Nev. 261; *Ex Parte Ryan*, 17 Nev. 139.)

The complaint of A. C. Florio charging the petitioners here with accepting deposits in an insolvent banking institution when the petitioners, being officers of the bank, knew said bank to be insolvent, is a good complaint charging the offense described in the act approved March 29, 1907. (Stats. 1907, p. 414.) It is true it does not denominate the offense as "embezzlement," but since it states all the facts constituting the crime which that statute calls embezzlement, it is sufficient. (*State v. Anderson*, 3 Nev. 254; *State v. Johnson*, 9 Nev. 175; *State v. Angelo*, 18 Nev. 425; Comp. Laws, 4200; 10 Ency. Pl. & Pr. 480.)

Upon the oral argument we said that, in order to discharge the petitioners, the court must declare three acts unconstitutional; the two of 1909 and that of March 29, 1907, and that the act of 1907 had already been declared constitutional by the supreme court of this state. (*Ex Parte Pittman*, 31 Nev. 44.)

We respectfully submit that in these proceedings the sole duty of the court is to order the petitioners remanded to the custody of the sheriff of Eureka County.

Per Curiam:

Delay in the determination of this case is regretted; but as the members of the court have been occupied with matters of greater public concern, and the petitioners have been at liberty on bail, it has been deemed best to wait until careful consideration could be given to the numerous important questions involved. An examination of decisions relating to *habeas corpus* indicates that

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many of them have been rendered hurriedly and without taking time for careful consideration of the reasons and statutes that ought to control.

The petitioners Oscar J. Smith and W. E. Griffin were arrested in Washoe County by the sheriff of Eureka County, under warrants of arrest issued by the justice of the peace at Eureka, charging the commission of felonies in Eureka County. Smith and Griffin applied to District Judge Moran, in Washoe County, for writs of *habeas corpus*, and were by him admitted to bail pending the determination of their applications. Thereafter, and before any final decision had been rendered by the district judge, they filed with the clerk of the district court purported written dismissals of their petitions for writ of *habeas corpus*, and under an order of their bail for their arrest surrendered themselves to the bailiff of the supreme court and applied for writs of *habeas corpus* before this tribunal, and obtained here an alternative order temporarily restraining the district court from deciding the cases brought before it and sought to be dismissed.

Three complaints and three warrants of arrest accompanying them, issued by the justice of the peace of Eureka township, in the county of Eureka, charged, respectively, the commission in that county of the crimes of felonious receipt of money on deposit in an insolvent banking corporation, the felonious assenting to the reception of deposits in an insolvent banking corporation by the directors of such bank while having knowledge of its insolvency, and the felonious subscribing to false papers, with intent to deceive the bank examiner. Later Oscar J. Smith, W. E. Griffin, H. F. Golding, and C. H. Gorman were arrested in Washoe County, and John Hancock, Sr., in Esmeralda County, all by the superintendent of the state police and officers acting under him, on bench warrants issued under the following indictments found by the grand jury of Eureka County, charging offenses alleged to have been committed in that county as follows:

Against Oscar J. Smith, W. E. Griffin, and H. F. Gold-

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ing for publishing false statement on July 31, 1909, under act of 1909; against Oscar J. Smith, W. E. Griffin, and C. H. Gorman, for publishing false statement on December 4, 1909, under act of 1909; against Oscar J. Smith, W. E. Griffin, and C. H. Gorman for publishing false statement February 6, 1910, under act of 1909; against Oscar J. Smith, Bert L. Smith, W. E. Griffin, John Hancock, Sr., and H. F. Golding for acceptance of checks, to wit, money on deposit, without interest, November 8, 1909; against Oscar J. Smith, Bert L. Smith, W. E. Griffin, John Hancock, Sr., and C. H. Gorman for acceptance of checks, to wit, money on deposit, without interest, March 14, 1910; against Oscar J. Smith, Bert L. Smith, W. E. Griffin, John Hancock, Sr., and C. H. Gorman for acceptance of certain checks, to wit, money on deposit, without interest, March 8, 1910; against Oscar J. Smith, Bert L. Smith, W. E. Griffin, John Hancock, Sr., and C. H. Gorman for acceptance of certain checks, to wit, money on deposit, March 15, 1910; against Oscar J. Smith, Bert L. Smith, W. E. Griffin, and John Hancock, Sr., for conniving at the reception of deposits, to wit, certain checks or money in an insolvent incorporated bank, by the directors thereof, March 21, 1910; against Oscar J. Smith, Bert L. Smith, W. E. Griffin, and John Hancock, Sr., for assent to the reception of deposit in an insolvent incorporated bank, by the directors thereof, March 19, 1910; and against C. H. Gorman for acceptance of money, to wit, check on deposit, without interest, March 21, 1910.

On behalf of petitioners Smith and Griffin, it is claimed that the purported dismissals filed by them in the district court, and their arrest and detention by the bailiff of the supreme court under the order of their bail, operated to place them under arrest by virtue of the original arrests made in Reno by the sheriff of Eureka County under the warrants issued by the justice of the peace. They allege that the arrests under the warrants issued by the committing magistrate were illegal, for the following reasons: That the justice of the peace of Eureka township had no jurisdiction to issue the warrants, because petitioners

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were not in, nor within fifty miles of, the boundaries of Eureka County at any of the times mentioned in the complaints upon which the warrants purport to be based, or within sixty days prior to or since any of said times. "And petitioners further allege that the courts of Eureka County, Nevada, are without jurisdiction or power to try or examine or determine the offenses alleged or attempted to be alleged or charged or stated in any of the pretended warrants or complaints; * * * and, further, because the petitioners, or either of them, had no authority at any time to close the Eureka County Bank named in the complaint upon which the warrants were issued; and for the further reason that the pretended offenses attempted to be set forth in said pretended complaint and warrants were not triable in said county of Eureka"; that the banking corporation mentioned was closed, by order of the Nevada State Banking Board, on the 22d day of March, 1910, and that such closing was without due process of law, and without any authority or right whatever, by reason of the fact that the act of the legislature of the State of Nevada under which said board pretended to act (Stats. 1908-09, pp. 251-267) is unconstitutional, null and void, "because the Eureka County Bank is a corporation duly organized and existing under an act of the legislature of the State of Nevada entitled 'An act to provide for the formation of corporations for certain purposes,' approved March 10, 1865 (Stats. 1865, c. 111)," and petitioners deny the right of the legislature to bring the said Eureka County Bank within the terms of an act entitled "An act to define and regulate the business of banking, creating and providing for a bank examiner and the examination and supervision of banking corporations, and for the appointment of receivers in certain cases, fixing the penalties for the violation thereof, and other matters relating thereto," approved March 24, 1909; "that if the above-mentioned pretended offense was at all committed the same is not triable in said county of Eureka."

They further deny "that they, or either of them, in any manner received the deposit mentioned in the pretended

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complaint of Florio (Exhibit B) on the date named in said pretended complaint, or on any other date, or otherwise, or at all, and deny that they, or either of them, in any manner, or at all, assented to the reception of the deposit mentioned in said pretended complaint of Florio, or of the deposit mentioned in the pretended complaint of Hintze (Exhibit D), in or by said bank mentioned in said pretended complaints, or in or by any bank in said Eureka County or elsewhere, and further deny that said bank was insolvent at any of the times named in said complaints, or at any time prior thereto, and deny that petitioners, or either of them, had knowledge of such insolvency; and petitioners allege that neither of them has any knowledge whatever that any such deposits, as mentioned in said pretended complaints, were ever received by or in said bank."

They allege that the offenses attempted to be charged in two of the complaints (Exhibits B and D) are based upon the act of the legislature entitled "An act making it a felony for any banker, or any officer, director, cashier, teller, managing member, manager, clerk, person, party or agent of any bank, banking corporation, association, firm or person engaged in banking, brokerage, exchange or deposit business to receive, or accept or assent or be accessory to or permit the reception of deposits of money, currency or valuable paper, in banking and other institutions, knowing the same to be insolvent; providing a punishment therefor and establishing a rule of evidence in connection therewith," approved March 13, 1909 (Stats. 1909, c. 92). They assert that the act is null and void, for the reason that it is impossible to give it any precise and intelligible meaning or application in the circumstances under which it was apparently intended to operate; and that, having no judicial certainty as to its meaning, being penal in its operation, courts are not at liberty to supply any deficiency necessary to make the statute certain.

They further allege that this act is in contravention of the provisions of the fourteenth amendment to the con-

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stitution of the United States, that "no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property without due process of law, nor deny any person within its jurisdiction the equal protection of the laws," for the reason that it seeks to enforce a system of vicarious punishment, and to make one man suffer for the offenses of another, thereby denying the equal protection of the laws; and for the further reason that it permits directors of a bank to evade the penalties of the act, and does not extend the same privilege to a cashier, teller, managing member, manager, clerk, person, party or agent, or any officer of a bank as mentioned in said act, other than a director.

They further allege that this act is in contravention of the sixth amendment to the constitution of the United States, which provides: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him"—for the reason that said act denies the right to be confronted by witnesses; and, further, in this: That it prescribes a rule of evidence conclusively establishing guilt.

They further allege that the general banking act defining and regulating the business of banking, approved March 24, 1909, is in contravention of other sections of the federal and state constitutions. If the provisions of this act on which a part of the charges against petitioners are based are repealed, as hereafter explained, by reference to the general banking act as passed in 1911, it is unnecessary to consider any objections to it based on constitutional grounds.

It is also claimed that petitioners committed no acts which the law makes criminal or over which the court

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in Eureka County has jurisdiction; that part of the petitioners were not in Eureka County at the time they are alleged to have committed the acts charged in the complaints and indictments; and that they ought to be discharged from the indictments because of the prejudice and conduct of the district judge, who, with a blind commissioner, selected the grand jury. Evidence in support of these contentions was admitted on the hearing in this court, subject to objection and the claim by the state that the indictments are conclusive, and that testimony is inadmissible to show that the petitioners were not in Eureka County, or that any acts committed by them did not constitute an offense within the jurisdiction of the court in that county.

Past decisions appear to be decisive of the objection on constitutional grounds to the penal statute relating to the receipt of deposits.

In *State, ex rel. Sparks, v. State Bank and Trust Co.*, 31 Nev. 456; *Ex Parte Pittman*, 31 Nev. 43, 22 L. R. A. (N. S.) 266, 20 Ann. Cas. 1319, and *Ex Parte Rickey*, 31 Nev. 104-105, 135 Am. St. Rep. 651, we held that the legislature could regulate the banking business.

In *Marymont v. Banking Board*, 33 Nev. 340, we held that the legislature might regulate, but could not prevent persons from engaging in, the banking business, while allowing that right to corporations.

In *Noble State Bank v. Haskell*, 219 U. S. 111, 31 Sup. Ct. 186, 55 L. Ed. 112, 32 L. R. A. (N. S.) 1061, Ann. Cas. 1912A, 447, it was held that the levying and collection from banks existing under state laws of an assessment based upon daily average deposits, for the purpose of creating a depositors' guaranty fund for the purpose of securing the full payment of deposits in case any such bank becomes insolvent, it is a valid exercise of the police power. In that case the Supreme Court of the United States, considering provisions of the federal constitution which, it was claimed, restricted the power of the state or the legislature, Judge Peckham writing the decision, said: "We are of opinion that it may go on from regula-

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tion to prohibition, except upon such conditions as it may prescribe."

Whether the legislature may entirely prohibit the banking business was not a question before the court in that case, and to this extent the language may be considered obiter. The court said that objections under the state constitution were not open there. Whether that eminent tribunal, or any court, would hold that the legislature may entirely prohibit the banking business, because it is of such public concern that it is subject to regulation, it is not necessary to consider, any more than it would be to determine whether the legislature may prohibit the sale of groceries and drugs, because laws are properly enacted requiring the purity of these articles, or to prohibit the transportation and manufacturing businesses, because laws are properly enacted regulating and safeguarding these under the police power.

So far as the matter need be considered here, these decisions have properly determined that the banking business may be regulated; and a bank is not exempt from such regulation as that attacked here, because the bank was incorporated prior to the enactment of the legislation providing for the regulation or creating penalties. By the enactment long ago of incorporation or other laws the legislature did not deprive itself of the power to pass laws later, under the police power, for the welfare of the state and her people.

In *Wallace v. Reno*, 27 Nev. 81, 73 Pac. 531, 63 L. R. A. 337, 103 Am. St. Rep. 747, quoting from *Beer Company v. Massachusetts*, 97 U. S. 25, 24 L. Ed. 989, we said: "Whatever differences of opinion may exist as to the extent and boundaries of the police power, and however difficult it may be to render a satisfactory definition of it, there seems to be no doubt that it does extend to the protection of the lives, health, and property of the citizen and to the preservation of good order and the public morals. The legislature cannot, by any contract, divest itself of the power to provide for these objects. They belong emphatically to that class of objects which demand

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the application of the maxim, '*Salus populi suprema est lex*,' and they are to be attained and provided for by such appropriate means as the legislative discretion may devise. That discretion may no more be bargained away than the power itself."

It is urged by respondent that this court cannot properly admit or consider the testimony admitted, subject to objection on the hearing in this court. There are many varying cases relating to the rights of the citizen to be discharged upon *habeas corpus*. This may be due largely to the difference of the statutes upon which the opinions are based, and, further, in part, to the need of having decisions rendered promptly, if the petitioner remains under arrest, and without always giving time for the most mature deliberation. Decisions in other states, which are without such statutory provisions as we have, relating to the taking of testimony and the discharge of accused persons upon *habeas corpus*, cannot be considered as applicable, or as having the force of repealing these clear and just requirements passed at the legislative session of 1862, prior to the adoption of the constitution, and impliedly sanctioned by that instrument. The clear provisions of our statute direct that the judge before whom a writ of *habeas corpus* is returned shall "proceed to hear and examine the return," and "in a summary way to hear such allegation and proof as may be produced against such imprisonment or detention or in favor of the same and to dispose of such party as the justice of the case may require," and that "such judge shall have full power and authority to require and compel the attendance of witnesses by process of subpoena and attachment, and to do and perform all other acts and things necessary to a full and fair hearing and determination of the case." (Rev. Laws, 6239, 6240, 6242.)

The provision that it is the duty of the "judge to remand the party if it shall appear that he is detained in custody by virtue of the final judgment or decree of any competent court of criminal jurisdiction or of any pro-

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cess issued upon such judgment or decree or in cases of contempt of court" implies that he may be discharged in other cases, if it appears from the evidence that there is not ground for detaining him. (Rev. Laws, 6244.)

We are unaware of any language that can more clearly authorize the discharge of petitioners from custody, when held under judicial process not final, or, if final, when issued by a court without jurisdiction, than the provision in the next section of our *habeas corpus* act that, "if it appears on the return of the writ that the prisoner is in custody by virtue of process from any court or judge or officer thereof, such prisoner may be discharged, * * * first, when the jurisdiction of such court or officer has been exceeded. * * * Fourth, when the process, though proper in form, has been issued in a case not allowed by law. * * * Sixth, where a party has been committed on a criminal charge without reasonable or probable cause."

The next section provides that no person shall be discharged from custody by reason of defect of form of any warrant or commitment of a justice of the peace. The next section provides: "If it shall appear to the judge, by affidavit, or upon hearing of the matter, or otherwise, or upon the inspection of the process or warrant of commitment, and such other papers in the proceedings as may be shown to such judge, that the party is guilty of a criminal offense, or ought not to be discharged, such judge, although the charge be defectively or unsubstantially set forth in such process or warrant of commitment, shall cause the complainant, or other necessary witnesses, to be subpoenaed to attend at such time as shall be ordered, to testify before such judge; and upon the examination, he shall discharge such prisoner, let him to bail, if the offense be bailable, or recommit him to custody, as may be just and legal." (Rev. Laws, 6247.)

The taking of testimony is directed; and the clear intention of these provisions is that the guilty shall not escape by reason of defect of form, and that persons held under arrest without reasonable or probable cause, or in cases

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not allowed by law, shall be discharged, notwithstanding they are held under process in due form issued before final judgment.

As we have heretofore held, acts which the law declares to be criminal are the only ones which constitute crime, or for which a criminal court has jurisdiction to try an accused person. The feeling of persons, one or more, in any community, however sincerely believing themselves to have been wronged, and the zeal or desire to convict of prosecuting or other officers, or of special counsel employed, or the indictment of a grand jury, which is in its nature a criminal complaint, cannot make any person guilty of a felony for the commission of an act which the law does not make criminal. Under the provision of the constitution prohibiting *ex post facto* laws and granting to all persons the equal protection of the law, the legislature itself cannot make any act punishable which was not so by law at the time it was committed.

However earnestly the depositors of the closed bank who lose a portion of their money may feel aggrieved, and however much they and the stockholders who lose all of theirs may be entitled to sympathy, their desire, or the desire of their friends or sympathizers, to punish cannot authorize punishment or prosecution further than the law itself provides. Any other rule would be dangerous, and would lead to the overthrow of the law, or to its supplanting by the desires for revenge or will of persons aggrieved, and to uncertainty and chaos in the administration of justice. Courts, district attorneys, and law-abiding citizens cannot properly demand that any person be punished or prosecuted for any act which is not made criminal by law. When a court attempts to punish for the commission of acts which are not made criminal by law, it goes beyond its jurisdiction into the domain of legislation, which is committed exclusively to another department of government.

Among the paragraphs treating this subject, in *Ex Parte Rickey*, 31 Nev. 89, 135 Am. St. Rep. 651, is the following: "As was said in *Re Corryell*, 22 Cal. 178,

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quoted in *Ex Parte Kearny*, 55 Cal. 229: 'The court derives its jurisdiction from the law, and its jurisdiction extends to such matters as the law declares criminal, and none other; and, when it undertakes to imprison for an offense to which no criminality is attached, it acts beyond its jurisdiction.' * * * 'If it appears by the return of the writ that the party be wrongfully committed * * * for a cause for which no man ought to be imprisoned he should be discharged or bailed.'"

In the same case, at page 102 of 31 Nev. (135 Am. St. Rep. 651), quoting from the opinion in *Ex Parte Deidesheimer*, 14 Nev. 311, we said: "Penal laws generally prescribe what shall or shall not be done, and then declare the consequences of a violation of either requirement. They should be plainly written, so that every person may know with certainty what acts or omissions constitute the crime. (Bishop on Stat. Crimes, 193; Beccaria on Crimes, 22, 45; *The Schooner Enterprise*, 1 Paine, 33, Fed. Cas. No. 4499.) * * * And in *United States v. Wiltberger*, 5 Wheat. 76, 5 L. Ed. 37 (opinion by Chief Justice Marshall), the court says: 'It has been said that, although penal laws are to be construed strictly, the intention of the legislature must govern in their construction; that if a case be within the intention, it must be considered within the letter of the statute. The rule that penal laws are to be construed strictly is, perhaps, not much less old than construction itself. It is founded on the tenderness of the law for the rights of individuals, and on the plain principle that the power of punishment is vested in the legislative, not in the judicial, department. It is the legislature, not the court, which is to define a crime and ordain a punishment. * * * The intention of the legislature is to be collected from the words they employ. Where there is no ambiguity in the words, there is no room for construction. The case must be a strong one, indeed, which would justify a court in departing from the plain meaning of the words, especially in a penal act, in search of an intention which the words themselves do not suggest. To determine that a case is

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within the intention of a statute, its language must authorize us to say so.' See, also, Sedgwick on the Construction of Stat. & Const. Law, 279, *et seq.*; Smith's Commentaries, 746; Bishop on Stat. Crimes, 192, *et seq.* Considering the construction of a penal statute in the case of *State v. Wheeler*, 23 Nev. 143, 152, the court said: 'Being penal, the provision exempting persons from the operation of the law should, on the other hand, receive a liberal interpretation.' Mr. Bishop states the rule thus: 'While the parts of a penal statute which subject to punishment or a penalty are, from their odious nature, to be construed strictly, those which exempt from penal consequences will, because of their opposite character, receive a liberal interpretation.' (Bishop, Writ. Laws, 196, 226.) To the same effect are Sutherland, Stat. Const. 227; Endlich, Stat. Int. 332."

We again affirmed these long and well-established principles in *Ex Parte Smith*, 33 Nev. 482.

The committing magistrate and grand jury at Eureka had complete jurisdiction over all felonies committed in that county; and it is not the purpose of the writ of *habeas corpus* to determine in advance of trial whether a felony has been committed there, if the prosecuting officers of the state bona fide claim and have evidence to show that a crime has been committed in that county. If there were any probable cause or any evidence which would indicate the commission of a crime, any on which the petitioners might be tried and on which a trial jury might act, and which would support a verdict of guilty, it would be proper to dismiss these writs and have the petitioners remanded for trial. It is well settled that the writ is not designed to take the place of an appeal. The purpose of the writ is not to interfere with the jurisdiction of any court, nor with the functions of trial judges in determining as to the guilt of persons charged, against whom there is evidence indicating that they have broken the law. It will seldom issue; but it will issue, and ought to issue, in every case for the discharge of persons accused of crime, when it is clear or undis-

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puted that the acts for which they are held are not such as are made criminal.

It is the commission of an offense which gives the grand jury authority to indict. If no offense has been committed, then there exists no foundation for an indictment. An indictment has no greater sanctity than that given by the statutes. Power to find an indictment rests primarily upon the determination that an offense has been committed. We see no difference, in legal effect, between an indictment which fails to charge a public offense and an indictment which charges a public offense, without facts constituting such offense to support it, with the exception that in the former case the want of jurisdiction is apparent upon the face of the indictment. Suppose, for example, A. is indicted in Elko County for the murder of B. by shooting him with a pistol on the 1st day of January, 1912. Upon such indictment, A. is subsequently arrested in the county of Washoe upon a bench warrant issued upon the indictment. Suppose A. is prepared to show that he was not in the county of Elko at the time of the alleged homicide, and, further, that B. was not only not killed, but was alive at the time of the arrest, and suppose that this showing is not controverted by the state. Is A. not entitled to be discharged on *habeas corpus*, upon the ground that the grand jury of Elko County had no jurisdiction to find the indictment, because no offense, such as charged in the indictment, was ever committed? We think he would be.

Take the case of Buckaroo Jack, 30 Nev. 325. The defendant, an Indian, was indicted and convicted of the murder of another Indian. The indictment did not allege that the defendant, nor the person killed, was an Indian; but the proof showed that both were Indians and wards of the government. Had the homicide occurred on an Indian reservation, the state courts would not have had jurisdiction. It was contended in that case that the indictment did not show jurisdiction in the trial court, for the reason that it did not negative the federal jurisdiction. We held that it was not necessary that the indictment

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negative the federal jurisdiction, for the reason that, the state jurisdiction being general, and the federal jurisdiction being special and limited, such negation was not required, citing a number of cases supporting the doctrine. The evidence in the case showed that the murder was not committed upon a reservation; and hence the state courts had jurisdiction to indict and punish. But, suppose the offense in fact had been committed upon an Indian reservation, the indictment, upon its face, under the authorities cited, would have been sufficient, although in fact the court neither had jurisdiction of the person of the defendant, nor of the subject-matter charged in the indictment. Could not the defendant, on *habeas corpus*, have shown the want of jurisdiction and have been discharged? Manifestly he could have been, without waiting for the delay and expense of a trial.

In these views expressed, we do not fail to appreciate the function of a grand jury or the limitations of a hearing upon *habeas corpus*. If a grand jury has evidence before it which, if true, shows that an offense has been committed, and evidence which, if unexplained or uncontradicted, shows that a certain person has committed the offense, it is its duty to indict. Upon *habeas corpus*, the judge or court cannot determine disputed questions of fact, for the purpose of determining whether an offense has been committed, or whether the defendant is guilty thereof. But if from the showing made on *habeas corpus* it appears, without substantial contradiction, that no offense has been committed, or, if committed, the defendant clearly is not guilty thereof, a showing has been made establishing want of jurisdiction to find the indictment. The power of the state to prosecute cannot be made an engine of persecution. The state, in good faith, is bound to be just to a person charged with crime; and if on *habeas corpus* it fails to combat a clear showing that the grand jury could have had before it no evidence upon which a jury might be justified in finding a verdict of conviction, then the petitioner ought to be discharged. This view does not invade the province of the trial jury,

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for upon *habeas corpus* the judge or court cannot determine in regard to a substantial conflict in the evidence, which is the exclusive function of the trial jury; but it can inquire whether any substantial evidence exists which, if true, would support a verdict of conviction, for if there is none the grand jury has exceeded its powers, and the indictment is void.

It is said in 12 Cyc. p. 196, that "criminal jurisdiction is the power and authority constitutionally conferred upon a court, judge, or magistrate to take cognizance of an offense and to pronounce the judgment or sentence provided by law, after a trial in the manner sanctioned by law as proper and sufficient."

"All public offenses triable in the district courts must be prosecuted by indictment." (Rev. Laws, 6999.)

Under chapter 7 of the criminal practice act, "Of the Local Jurisdiction of Public Offenses," it is provided: "Every person * * * is liable to punishment by the laws of this state for a public offense committed by him therein. * * *" (Rev. Laws, 6908.)

An indictment is defined by statute to be: "An accusation in writing, presented by a grand jury to a competent court, charging a person with a public offense." (Rev. Laws, 7022.)

The indictment should be found "when all the evidence, * * * taken together, is such as * * * would, if unexplained and uncontradicted, warrant a conviction by the trial jury." (Rev. Laws, 7026.)

"The grand jury must * * * inquire into the offenses cognizable by them." (Rev. Laws, 7015.)

"The grand jury must inquire into all public offenses committed, and triable within the jurisdiction of the court. * * *" (Rev. Laws, 7020.)

The foreman and members of the grand jury are required to take oath to "inquire into, and true presentment make of, all offenses against the State of Nevada committed and triable within this county, of which you shall have or can obtain legal evidence." (Rev. Laws, 7012, 7013.)

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In *State v. Chamberlain*, 6 Nev. 257, it was held that an allegation of the county wherein a crime is committed is necessary, notwithstanding the statutory form of indictment makes no reference to the county.

The prosecuting witness, who swore to the complaints in the cases in which they were arrested under the warrants of the committing magistrate of Eureka County, states in his testimony before this court that he does not know that they were in Eureka County; and there is no evidence, contrary to the positive testimony of witnesses on their behalf, that they were not there. The attorney for the state declined to make any admission; but a failure to deny or offer any testimony against the evidence submitted by the petitioners, or to claim that the state could produce any contrary evidence upon a trial, is deemed equivalent to an admission. In the absence of any claim or showing that the petitioners have committed some act which is made criminal and punishable in Eureka County, and in view of the uncontradicted evidence submitted by the petitioners, the accused are entitled to liberty, under the constitutional right to the writ of *habeas corpus* for the protection of the citizen.

Respondent appears to be in the position of asking this court to ignore, or in effect to repeal, the plain provisions of the *habeas corpus* statute for hearing testimony and discharging accused persons, and of urging this court to remand the petitioners to custody for trial, when, under the undisputed evidence presented, it appears that they have not committed acts which amount to felony, or other crime for which they are sought to be held and tried. Under these circumstances, it would not be observing the constitutional guaranties to liberty and the right to the writ for the release of persons held in custody without legal cause, nor just to the accused, nor to Eureka County and the state, to proceed to fruitless trials, with the incumbent trouble and expense to petitioners and taxpayers.

It is a well-recognized rule that, where a person is charged with felony and is bound over by a committing

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magistrate, he will be discharged if the testimony which is required to be taken down by the magistrate does not show, and there is no evidence to indicate, that he is guilty of any offense. (*Ex Parte Willoughby*, 14 Nev. 451.)

In view of the provisions of our statute providing for the taking of testimony and the discharge of accused persons not detained in custody by virtue of final judgment of a competent court of criminal jurisdiction, and the indictment and bench warrant issued under it being previous to trial and not under the final judgment of a court of competent jurisdiction, no good reason appears why the accused should not be discharged in such cases as readily as in others before judgment; for he is entitled to release and liberty when there is no probable cause for believing that he has committed some act which the law declares to be criminal, and he is held in a case not allowed by law. The state ought not to proceed against persons criminally, unless there is reasonable or probable cause for believing, or some evidence tending to show, that they have committed some act which the law makes an offense.

After all, should not the controlling question be whether there is any probable cause or evidence to indicate that the accused has committed any act within the jurisdiction of the court, which the law makes criminal, or is there anything for it to try, or any evidence available to the state which would indicate the commission of an offense or sustain a conviction? Under our statute, with its liberal provisions for taking testimony and for the examination of the merits of the case, we see no reason why we should not investigate it to the bottom and discharge any of the petitioners, if justice requires, or if it is clear that they have not committed any acts within the county or the jurisdiction of the court, which the law makes criminal. Except as to the method of arriving at the facts, when we consider the real facts relating to any acts done by the petitioners, which are claimed to be criminal, these cases are not materially different from others which have been determined by this court.

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In the Rickey case it was charged in the indictment that Rickey, who was a director and the president of an incorporated bank, had received the deposit through the teller. Differently than in the present proceeding, the attorneys for the state in that case, desiring to have a construction by this court of the statute in *habeas corpus* proceedings, and without burdening the county and the accused with the expense of a trial, frankly admitted that Rickey had not received the deposit personally, and freely left the court to determine whether the fact that he was a director and president of the bank made him guilty of receiving a deposit, or of any offense for which he would be properly triable by reason of his being a director and president of the bank at the time that the deposit was received by the teller.

In the Davis case (33 Nev. 309), after conviction in the justice's court, and again on appeal, the findings of fact were voluntarily submitted for the consideration of this court in the *habeas corpus* proceeding and the petitioners discharged, because, under our construction of the law, the acts committed by the petitioners did not constitute an offense, notwithstanding the justice's court and the district court had so held. It was held that, where the evidence, without conflict, shows that the defendant is exempted from the penal provisions of the statute, the court is without power to render a judgment of conviction.

A voluntary submission of the facts takes the place of testimony; and, if the real facts on a *habeas corpus* proceeding may be submitted by consent or stipulation and considered, no good reason appears why testimony may not be taken to establish the facts under our statute providing that the judge shall hear the evidence, regardless of whether opposition may be made to the taking of evidence. There are decisions, not in conflict with these views, which are directly distinguishable, because the petitioners in those cases did not present uncontradicted evidence showing want of probable cause, and that no acts had been committed by the person indicted or

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charged with crime which were made criminal by law, or were within the jurisdiction of the court. In the Spencer case, 34 Nev. 240, we heard testimony for and against the petitioner on the application for a writ of *habeas corpus* and discharged him, because the evidence indicated that he was not within the jurisdiction of the court in Illinois, notwithstanding the requisition of the governor. In Waterman's case, 29 Nev. 288, 11 L. R. A. (N. S.) 424, 13 Ann. Cas. 926, we discharged him from the requisition of the governor, because the indictment found in another state did not state facts constituting an offense.

Is there not as much reason to protect the citizens of this state from being taken to another district, hundreds of miles away, the courts of which are clearly without any jurisdiction, as to protect citizens of other states from being removed from this state for trial to another state which has no jurisdiction, because they were absent and did not participate in any crime there? The statute makes no distinction. It, as well as the constitution and statutes of the United States, requires that the "judicial proceedings of the court of any state * * * shall have such faith and credit given to them in any court within the United States as they have by law or usage in the courts of the state from which they are taken." (Rev. Laws, 159, 526; Const. U. S. art. 4, sec. 1; Rev. Stats. 905.) It is evident that the reasons are quite as strong for discharging the petitioners here as in the Rickey, Smith, Davis, Spencer, and other cases. In *Ex Parte Dela*, 25 Nev. 346, 83 Am. St. Rep. 603, the petitioner was released upon *habeas corpus* from the final judgment of the district court, because he had been convicted of rape, when the indictment charged him with the crime of murder and with the commission of acts constituting both the crime of murder and rape.

In the case of *People v. Wells*, 57 App. Div. 140, 68 N. Y. Supp. 59, upon the return of a writ of *habeas corpus*, the sheriff held the custody of the prisoner by virtue of the commitment of a justice of the peace, to which a traverse was interposed, alleging that there was not

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sufficient evidence before the justice that the alleged crime had been committed, or sufficient cause to believe the prisoner guilty thereof, to which traverse the sheriff interposed a demurrer, on the grounds that it did not state facts sufficient to constitute a traverse. The Supreme Court of New York held that the demurrer was not well taken, and that, in the absence of any evidence that the crime had been committed, or that the prisoner was guilty thereof, the magistrate was without jurisdiction. The court said: "This case presents a question of right upon a writ of *habeas corpus*, which is well termed the greatest writ of the common law, because it assures and secures personal liberty by simple and direct process available to every citizen. Its place is above debate and dissension. Hume, who wrote hatred of Whiggism into history, wrote: 'This law seems necessary for the protection of liberty in a mixed monarchy. As it has not place in any form of government, this consideration alone may induce us to prefer our present constitution to all others.' Junius, the friend of Wilkes, wrote of it to Lord Mansfield as 'so fully considered as another Magna Charta of the Kingdom.' The Tory Dr. Johnson, who wrote against Junius, said: 'The duration of parliament, whether for seven years or for the life of the king, appears to me so immaterial that I would not give half a crown to turn the scale one way or the other. The *habeas corpus* is the single advantage which our government has over all other countries.' And, quoting him, the Whig Macaulay, who also accused Hume of being a partisan historian, said: 'It is, indeed, not wonderful that the great law should be prized by all Englishmen, for it is a law which, not by circumlocution, but by direct operation, adds to the security and happiness of every inhabitant of the realm.' And a later historian, Goldwin Smith, writes that, among the five checks reckoned against absolutism, the *habeas corpus* has a place with the control by parliament over legislation, its legislative authority, the liability of royal officers to suit and impeachment, and the trial by jury. (The United Kingdom, vol. 1, p.

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296.) The value of the writ of *habeas corpus*, says Kent (Lect. XXIV, 32), is that 'personal liberty is not left to rest for its security upon general and abstract declarations of right.' The courts are jealous to assert that this right cannot be emasculated or curtailed by legislation. They should be jealous to declare its inviolability from any attacks in their own fora that menace its sweep and its power. There is a principle underlying this case beyond its instance that warrants a plain pronouncement of the law."

In *State v. Beaverstad*, 12 N. D. 527, 97 N. W. 548, it was held that jurisdictional matters only, and not irregularities and errors, can be reviewed on *habeas corpus*, and that where one is committed upon a criminal charge, without reasonable or probable cause, he may secure his release on *habeas corpus*, and that the court issuing the writ will look into the evidence far enough to see whether there is any tending to show that an offense was committed, and that there was cause to believe that the accused committed it.

In *Re Snell*, 31 Minn. 110, 16 N. W. 692, it was held that the evidence upon which the prisoner is bound over and committed by a justice of the peace may be examined by the court or officer before whom the prisoner is brought on *habeas corpus*, for the purpose of determining whether it fairly tends to show the commission of an offense, and whether it fairly tends to make out probable cause for charging the prisoner with its commission; but that the judgment of the committing magistrate should not be rejudged, upon inquiry into the weight of the evidence, further than necessary to determine these two propositions.

In *Re Brenner*, 3 Wyo. 412, 26 Pac. 993, it was held in a *habeas corpus* proceeding that where the evidence certified by a committing magistrate fails to show the venue the commitment is fatally defective, and that where the application is to the supreme court, and the expense of supplying such evidence would be burdensome to the parties, the prisoner may be discharged.

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In *Re Snyder*, 17 Kan. 542, it was held that the court or judge issuing a writ of *habeas corpus*, on a petition complaining that the person in whose behalf the writ is applied for is restrained of his liberty without probable cause, may, although there is no defect in the charge or process, summon the prosecuting witnesses, investigate the criminal charge, and discharge, admit to bail, or recommit the prisoner, as may be just and legal.

In *Ex Parte Champion*, 52 Ala. 311, it was held that a prisoner under a commitment of a justice of the peace may apply to the probate judge for a writ of *habeas corpus*, and that it is the duty of the judge to hear and pass upon the evidence touching the prisoner's guilt, and to discharge him if it appears that no offense has been committed, or if there is not probable cause for charging the prisoner.

In *Ex Parte Mahone*, 30 Ala. 49, 68 Am. Dec. 111, it was held that the accused has the right to offer evidence on *habeas corpus* touching his guilt, and that *mandamus* lies to compel a judicial officer to hear evidence on *habeas corpus* touching the guilt of a person before him. The court said: "We think a prisoner who is in custody simply on a warrant of commitment, issued after preliminary examination, and before any indictment has been found, can, when brought on *habeas corpus* before a proper officer, claim, as a matter of right, that such officer shall hear and pass on all legal evidence which he offers touching the question of his guilt. If, on such examination, 'it appears that no offense has been committed, or that there is no probable cause for charging the defendant therewith,' the prisoner must be discharged. 'If it appear that an offense has been committed, and there is probable cause to believe the defendant is guilty thereof,' the defendant must be bailed or committed as the law directs. (Code, secs. 3405, 3406.) In determining, as stated above, that prisoners can claim, as a matter of right, to have their witnesses heard, we think we are giving effect to the provisions of the code."

In *People v. Moss*, 187 N. Y. 410, 80 N. E. 384, 11 L. R. A. (N. S.) 528, 10 Ann. Cas. 309, it was held that, upon a writ

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of *habeas corpus* to review the legality of a petitioner's restraint on a warrant issued by a magistrate, the court will look back of the warrant and ascertain if the facts stated in the depositions of the prosecutor and his witnesses were sufficient to confer jurisdiction on the magistrate to issue the warrant.

In *State v. Huegin*, 110 Wis. 189, 85 N. W. 1047, 62 L. R. A. 700, a Wisconsin case, it was held that on *habeas corpus* proceedings the court has jurisdiction to examine into the sufficiency of the complaint of the committing magistrate to charge a criminal offense, and to the evidence as regards whether it will admit of a reasonable inference of the existence of the ultimate facts necessary to show that the offense was committed, and that there is probable cause for believing the accused to be guilty. It was further held that a *habeas corpus* suit reaches only jurisdictional errors, and that it does not reach beyond the commitment to the proceedings leading up thereto, where the person in custody is detained by virtue of the final judgment or order of a court having jurisdiction of the subject-matter, and the person in custody is being held on a commitment for trial, and that a preliminary examination is not an action, and that the determination thereof is not a final judgment. It was said that, where an examining magistrate acts upon evidence, and such evidence, looking at it from the most favorable standpoint, will not reasonably permit of the action of the magistrate, the error is jurisdictional and remediable by writ of *habeas corpus*, within the rule that such errors only can be reached by such writ.

In *People v. Sheriff*, 11 Civ. Proc. R. (N. Y. 172), it was held that, where a return is made to a writ of *habeas corpus* that the relator is held by virtue of a bench warrant, issued by a court of general jurisdiction upon an indictment found by a grand jury, the magistrate may go behind such return and inquire as to the validity of the process, although the number of matters subject to inquiry is limited for lack of evidence, though not from lack of power to make them.

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In *Re Hardigan*, 57 Vt. 100, it was held that in a *habeas corpus* hearing the rights of relator were not dependent upon the officer's return, and that he may deny the return and allege other material facts.

In *Re Farrell*, 36 Mont. 259, 92 Pac. 786, the court said: "If it were a case of a defective information only, it might well be contended, as the attorney-general contends here, that the district court had jurisdiction, and that this court should require the complainant to seek relief through the medium of his appeals. But if an information states facts which do not constitute any crime known to the law, or undertakes to state such an offense, but the facts stated do not constitute the offense, and no addition to them, however full and complete, can supply what is essential, then the court is without jurisdiction to put the complainant on trial. In such case the judgment cannot be corrected. It is simply void. Imprisonment under execution thereon is illegal, and the complainant is entitled to his release even though he might secure the same relief on appeal." (*State v. District Court*, 35 Mont. 321, 89 Pac. 63.)

In *Ex Parte Sternes*, 82 Cal. 246, 23 Pac. 38, the court said: "Petitioner thereupon offered to prove, and to introduce competent evidence for that purpose, that he was held by the magistrate and committed without probable cause, and claimed that upon making such proof he would be entitled to his discharge under subdivision 1487 of the penal code. To the introduction of this proof, the respondent objected, on the ground that this court was precluded from going behind the warrant of commitment and inquiring into the question of reasonable or probable cause by reason of the fact that an information had already been filed against the prisoner, claiming that the information took the place of an indictment by the grand jury, and had the same force and effect upon *habeas corpus*. Upon a brief consultation upon the bench, a majority of the justices then sitting were inclined to that view of the case, and, the warrant of commitment being regular upon its face, and issued by a court of

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competent jurisdiction, it was ordered that the prisoner be remanded. Subsequently the petitioner moved the court to set aside the order so made and allow the parties to file briefs upon the question of the admissibility of the testimony so offered, and the court, having doubts about the correctness of its ruling, granted the motion. Subsequently the parties were heard in open court upon the subject, and the testimony, consisting of the depositions and transcript of the evidence taken by the committing magistrate, was offered and received, subject to the final conclusion of the court as to the admissibility thereof. Upon more mature deliberation, we have concluded that we have not only the right, but that it is our duty, to inquire into the question of reasonable or probable cause, notwithstanding the filing of the information, and that the evidence tending to show whether there was such reasonable or probable cause is admissible, and the same is admitted."

In *People v. Hyatt*, 172 N. Y. 176, 64 N. E. 825, 60 L. R. A. 775, 92 Am. St. Rep. 706, it was held in *habeas corpus* proceedings that a crime will not be presumed to have been committed on a day when the accused was in the state, for the purpose of upholding extradition proceedings against him as a fugitive from justice, if the indictment charges its commission on an earlier date, when no claim or suggestion is made of error in the charge. When that case reached the Supreme Court of the United States (188 U. S. 711, 23 Sup. Ct. 459, 46 L. Ed. 661), the court said: "The indictments in this case named certain dates as the times when the crimes were committed, and where in a proceeding like this there is no proof, or offer of proof, to show that the crimes were in truth committed on some other day than those named in the indictments, and that the dates therein named were erroneously stated, it is sufficient for the party charged to show that he was not in the state at the times named in the indictments; and when these facts are proved, so that there is no dispute in regard to them, and there is no claim of any error in the dates named in the

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indictments, the facts so proved are sufficient to show that the person was not in the state when the crimes were, if ever, committed."

In *U. S. v. Greene* (D. C.), 100 Fed. 941, it was held that under the United States Revised Statutes, sec. 1014 (U. S. Comp. St. 1901, p. 716), which constitutes the only authority for arrest and removal to another district for trial of a person there charged with an offense against the United States, the proceedings before a commissioner for the commitment of a person so arrested is the same as that prescribed by the laws of the state for proceedings before a committing magistrate, the only issue before the commissioner being as to whether there is probable cause to believe the defendant guilty of the offense charged; and that the evidence admissible upon that issue is determined by the state practice; and that, as, under the laws of New York, the defendant is entitled to produce the testimony of witnesses, or any other competent evidence in his behalf, the exclusion of such evidence by a commissioner in that state is unwarranted. It was said further that, while an indictment is admissible in evidence in such a proceeding upon the question of probable cause, it is not conclusive, but is entitled to weight only as an affidavit tending to establish the facts and circumstances therein alleged.

In *Ex Parte Roquemore*, 60 Tex. Cr. R. 282, 131 S. W. 1101, 32 L. R. A. (N. S.) 1186, decided in November, 1910, the Texas Court of Criminal Appeals held that *habeas corpus* lies for the release of one in custody under conviction upon a complaint which charged no offense under the laws of the state, because no law existed making the acts committed by the accused an offense, although he did not pursue his remedy by appeal after trial and conviction. The court said: "We are met at the threshold of the case with the suggestion by our able assistant attorney-general that the writ of *habeas corpus* cannot apply in this character of proceeding; that it is sought merely as a method of appeal or *supersedeas*, and, under the authority of the cases of *Ex Parte Schwartz*, 2 Tex. App. 74, *Perry v. State*,

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41 Tex. 488, *Ex Parte Dickerson*, 30 Tex. App. 448, 17 S. W. 1076, and the still later case of *Ex Parte Cox*, 53 Tex. Cr. R. 240, 109 S. W. 369, cannot be entertained; and that the judgments of inferior courts can only be attacked by writ of *habeas corpus* for such illegalities as render them void (*Ex Parte Gibson*, 31 Cal. 619, 91 Am. Dec. 546); and that the erroneous judgments of inferior courts having jurisdiction of the subject-matter and of the person cannot be successfully attacked upon *habeas corpus*, unless they are so far erroneous as to be absolutely void (9 Am. & Eng. Ency. Law, p. 222); and that it is only when the proceeding is void that the writ of *habeas corpus* may be resorted to. (*Ex Parte Slaren*, 3 Tex. App. 662, and *Ex Parte Boland*, 11 Tex. App. 166.) That these general rules obtain, there can be no sort of question; but, as we believe, they have no application to the case here. * * * It is elementary, before a citizen can be punished as a criminal, that the offense must be clearly defined by statute and an appropriate penalty affixed thereto."

In *Tinsley v. Treat*, 205 U. S. 20, 27 Sup. Ct. 430, 51 L. Ed. 689, it was held that evidence tending to show that no offense triable in the federal district court, to which the accused is sought to be removed, has been committed by him in that district cannot be excluded in the removal proceedings, on the theory that a certified copy of the indictment and proof of the identity of the party accused furnishes conclusive evidence of probable cause. The court said: "It was held in *Beavers v. Henkel* (194 U. S. 73, 24 Sup. Ct. 605, 48 L. Ed. 882), *supra*, *Benson v. Henkel* (198 U. S. 1, 25 Sup. Ct. 569, 49 L. Ed. 919), *Hyde v. Shine* (199 U. S. 62, 25 Sup. Ct. 760, 50 L. Ed. 90), as well as *Greene v. Henkel* (183 U. S. 249, 22 Sup. Ct. 218, 46 L. Ed. 177), *supra*, that an indictment constituted *prima facie* evidence of probable cause, but not that it was conclusive."

In *Ex Parte Royall*, 117 U. S. 242, 6 Sup. Ct. 734, 29 L. Ed. 868, it was held that, where a person is in custody under process from the state court of original jurisdiction for an offense against the laws of such state, and it is

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claimed that he is restrained of his liberty in violation of the federal constitution, the circuit court has a discretion whether it will discharge him upon *habeas corpus* in advance of the trial in the state court.

In *U. S. v. Fowkes*, 53 Fed. 13, 3 C. C. A. 394, the opinion affirms the decision of the United States District Court, and was sustained by the United States Supreme Court in 149 U. S. 789, 13 Sup. Ct. 1053, 37 L. Ed. 963. The person charged had been arrested in Pennsylvania for a violation of the interstate commerce act, and held for removal to Missouri to answer an indictment there found. Notwithstanding the indictment, he was released upon *habeas corpus* because he had not committed any offense in Missouri. The federal judicial districts of Pennsylvania and Missouri are as distinct as the different districts of a state. Referring to the district court, the circuit court of appeals said: "The court did not try the case, but the learned judge did require that he should be satisfied before you deprive the relator of his personal liberty and order his transfer to a distant state for trial; that there was evidence on which a jury might convict in that state."

The circuit court of appeals further said: "The court alleged to have such cognizance in this case is a district court of the United States in Missouri. If he had committed a crime against the United States, and, if the district court referred to did have cognizance of it, the prisoner was, of course, lawfully held; but if either of these facts did not exist, then his imprisonment, being without the sanction of the only law of the United States relied upon for its justification, was violative of that law. It follows from what has been said that it was the duty of the district court, making 'inquiry into the cause of restraint of liberty' (Rev. St. 752) in the case of the relator, who alleged that he was in custody in violation of law, to direct that inquiry to the matters we have alluded to as relevant to the issue joined upon that allegation. (*Horner v. U. S.*, 143 U. S. 207, 12 Sup. Ct. 407, 36 L. Ed. 126.) Of this there can be no

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doubt; and, indeed, we do not understand that the learned district attorney has questioned the soundness of this general proposition, thus broadly stated, but that his contention relates only to the character of the inquiry which should be made and the extent to which it should be carried. The position taken on behalf of the United States is that the district court could not look beyond the indictment and the action of the commissioner by whom the relator had been committed; and this position was adhered to throughout the proceedings in that court, notwithstanding the fact that ample opportunity was afforded the appellant to produce evidence to refute that which was presented on behalf of the appellee. We, however, cannot sustain this view of the law. We do not doubt that a district court may, in its discretion, and in a proper case, order a warrant of removal upon the indictment alone; but it would be going much further, and much too far, as we think, to hold that in all cases, and especially in such a case as this record discloses, the judge is precluded from hearing any other evidence whatever, and must, upon mere inspection of the indictment, order the removal of the accused person to a considerable distance for trial, although evidence be offered which, if received, would conclusively establish that the court to which it is asked that he shall be remanded is without jurisdiction to try him. * * * The court, as already remarked, did not try the case, but the learned judge did require that he should be satisfied, before he would deprive the relator of his personal liberty and order his transfer to a distant state for trial, that there was evidence on which a jury might convict in that state. Yet no evidence whatever was offered on behalf of the government; and the only question which remains is as to whether the circumstances alleged and proved by the appellee justified the requirement that some evidence should be produced by the appellant. As was said by the learned judge, the circumstances were extraordinary. After a careful examination of the record, we adopt his statement of

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them: 'The relator, having been arrested and bound over to court, charged with the commission of crime in the State of Missouri, sued out a writ of *habeas corpus*, and the district attorney at the same time applied for a warrant of removal. On return of the writ, an indictment, found in Missouri, charging him with violation of section 10 of the interstate commerce statute, was presented in justification of the arrest and detention. In answer his counsel represented that the indictment was found without previous hearing, and that no hearing (except in form) has yet been allowed him; that no evidence can be produced to support the charge; that he has never been within the State of Missouri; that he has no connection with any other railroad than that of the Philadelphia and Reading Railroad Company, and that his connection with it, when the indictment was found, and previously, conferred upon him no authority whatever over the freight rates or charges for transportation, and that he never assumed, or attempted to exercise such authority; that he was simply freight claim agent of the company; and that his duties as such consisted in passing upon claims, and certifying his conclusions, for compensation on account of erroneous exactions in excess of the established rates, and for loss of or damage to property received by the company for transportation. In view of these representations, the relator was permitted to introduce evidence in support of them. The testimony heard (the truth of which is not questioned, as I understand) fully supports the representations.' "

Some of the earlier cases hold that a person charged with crime under an unconstitutional statute could not be released upon *habeas corpus*, and would be remanded for trial; but since the Supreme Court of the United States decided otherwise the cases generally hold that a person arrested under an unconstitutional statute will be discharged upon *habeas corpus*. Several decisions of this court are in accord with the Supreme Court of the United States. (*Ex Parte Rosenblatt*, 19 Nev. 439, 3 Am. St. Rep.

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901; *Ex Parte Kair*, 28 Nev. 127, 113 Am. St. Rep. 817, 6 Ann. Cas. 893.)

In Church on *Habeas Corpus*, at section 83, it is said: "At one time the courts did not favor the practice of looking into the constitutionality of a statute, in *habeas corpus* proceedings, to determine whether a party was rightfully imprisoned or lawfully convicted; but since the decision of the Supreme Court of the United States, in *Ex Parte Siebold*, 100 U. S. 371, 25 L. Ed. 717, the state courts are following the rule there laid down that the constitutionality of a law under which a person is imprisoned or convicted, is a proper matter for consideration on *habeas corpus*, because 'an unconstitutional law is void, and is as no law. An offense created by it is not a crime. A conviction under it is not merely erroneous, but is illegal and void, and cannot be a legal cause of imprisonment.' The same courts are following this rule for the sake of harmony; and the prevailing doctrine in state courts now is that the court will review, upon *habeas corpus*, the question of the constitutionality of an act or ordinance under which the petitioner has been convicted, or by virtue of which he is imprisoned; and, if such an act or ordinance is found to be unconstitutional, the prisoner will be discharged."

The rule being settled here that any person held in custody, because charged with an act forbidden by an unconstitutional statute, will be discharged upon *habeas corpus*, it naturally follows that a person charged with the commission of an act which is not made criminal by any statute is at least as innocent as a person who has committed some act forbidden by an unconstitutional statute.

Analogous to this now well-established rule that before or after conviction the court will discharge, on *habeas corpus*, a person who is held under an unconstitutional act of the legislature, reasons are quite as apparent for holding that an accused person will be discharged under a writ of *habeas corpus*, where he is held for some act which the law does not make criminal. Certainly a citi-

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zen who has not infringed any statute is as much entitled to his liberty and to be free from prosecution as the person who has violated an unconstitutional act, and the court is as much without jurisdiction.

At section 236 of Church on *Habeas Corpus*, it is said: "When it appears on the return that the prisoner is detained by virtue of any process, civil or criminal, from any court of competent jurisdiction, or issued by any officer in the course of judicial proceedings before him, authorized by law, and the process is regular and valid upon its face, the presumption will be in favor of the legality of such imprisonment; and the burden of impeaching its legality will be thrown upon the prisoner. But this he may do in various ways. He may show that the jurisdiction of such court or officer has been exceeded; that there has been some act, omission, or event, which has taken place since the issuing of the process, which entitles him to be discharged therefrom; that the process is defective in some matter of substance required by law; that, though proper in form, it has been issued in a case not allowed by law; that the person having his custody is not the person allowed by law to detain him; that the process is not, in reality, authorized by any order, judgment, or decree of any court, or by any provision of law, or that he has been committed without reasonable or probable cause. Mere errors and irregularities of procedure, however, not affecting the question of jurisdiction, are never reviewable on *habeas corpus*, and, where the process is regular and valid upon its face, there is no doubt that a preponderance of authority supports the rule that inquiry, on *habeas corpus*, will go only to the question of jurisdiction, in the absence of a statute authorizing the court or judge to review the sufficiency of the evidence upon which such process may be founded. But jurisdiction is always an open question, and may be inquired into by any court or judge competent to issue the writ. Thus the prisoner may be discharged on *habeas corpus*, either before or after judgment, where the statute or ordinance under which the proceedings are inau-

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gured against him is unconstitutional, as this is a jurisdictional defect, or where the complaint or commitment does not charge any crime known to the law."

It is well settled that upon a motion to quash an indictment a court can go behind an indictment, regular upon its face, and determine if it is void for any latent defect. (*U. S. v. Farrington*, 5 Fed. 343; *Eubanks v. State*, 5 Okl. Cr. 325, 114 Pac. 748; *Commonwealth v. Green*, 126 Pa. 531, 17 Atl. 878, 12 Am. St. Rep. 894; *People v. Lauder*, 82 Mich. 109, 116, 46 N. W. 956; *State v. Symonds*, 36 Me. 128; *Sparrenberger v. State*, 53 Ala. 481, 25 Am. Rep. 643; *State v. Lanier*, 90 N. C. 714; 22 Cyc. 206; 20 Cyc. 1347; *State v. Logan*, 1 Nev. 509.)

In *Eubanks v. State*, *supra*, the court held: "It is as much the duty of the grand jury to protect the innocent as to accuse the guilty. It should shield the citizen alike from the false accusation of private malice and the passion of the public clamor. It should never be used for the gratification of personal ill-will or hatred, or to promote the secret plottings of power, party, or faction, to defame the name, or to disgrace those whom public or private enemies wished to destroy. For those and many other reasons, its proceedings should be had with that deliberation and dignity that the importance of its functions require. As was said by Mr. Justice Tarsney, in the case of *Royce v. Territory*, 5 Okl. 61, 47 Pac. 1083: 'As the grand jury is an informing and accusing body, which makes its investigation and holds its deliberations in secret, and irresponsible for its official action upon matters of fact, except before the tribunal of public opinion, it is very important that its powers, duties, and methods of procedure should be well understood and should be strictly confined within the conservative and salutary limits imposed by law, which experience has shown to be necessary to subserve the public good and to accomplish a just and impartial administration of the criminal law.' Mr. Rice, in his work on Criminal Evidence (vol. 3, p. 40), says: 'The jealousy with which the early law guarded the secrets

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of the grand jury room has largely disappeared. The sacramental character of that august body is very imperfectly recognized at the present day. The theory that the proceedings before this body are beyond the scrutiny or condemnation of court or counsel is a foolish pretense that is very generally abandoned. Malice, corruption, and ignorance frequently combine to impress upon the proceedings of this body the tyrannical and oppressive functions of the Star Chamber and the Council of Ten. And to say, or even intimate, that, where corrupt practices exist, there is no method open for their proper disclosure is simply to insist that our criminal law is crippled with a hideous deformity.' The common-law rule of secrecy has no place under the provisions of our criminal procedure, which recognizes personal constitutional right as superior to every other consideration, and, whenever it becomes essential to the ends of justice to ascertain what has occurred before a grand jury, it may be shown by the testimony of the grand jurors, and particularly whether or not a vote or ballot was taken, showing the concurrence of the necessary number of grand jurors to find a true bill; the only limitation being that a grand juror will not be permitted to testify how any member of the jury voted, or the opinion expressed by any of them upon any question during their investigations."

In *U. S. v. Farrington, supra*, the court said: "It is the duty of the court, in the control of its proceedings, to see to it that no person shall be subjected to the expense, vexation, and contumely of a trial for a criminal offense, unless the charge has been investigated and a reasonable foundation shown for an indictment or information. It is due, also, to the government to require, before the trial of an accused person, a fair preliminary investigation of the charges against him. It is not the province of the court to sit in review of the investigations of a grand jury as upon the review of a trial when error is alleged; but in extreme cases, when the court can see that the finding of a grand jury is based upon such utterly insuf-

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ficient evidence, or such palpably incompetent evidence, as to indicate that the indictment resulted from prejudice, or was found in wilful disregard of the rights of the accused, the court should interfere and quash the indictment."

Our attention has been called to some late decisions. In the cases of *La Due*, 120 Pac. 13, and *Maginnis*, 121 Pac. 723, there was substantial conflict in the evidence, jurisdiction in the court, and probable cause, or other reasons for remanding the persons in custody, different from the cases now before this court, or cases in which the acts, for the commission of which accused is held, constitute no crime. In *Ex Parte Milsap*, 29 Okl. 472, 118 Pac. 135, the court cites *In re Newton*, 16 Com. B. 97, and *Ex Parte Edgington*, 10 Nev. 215. Differently than here, in those cases the accused persons were held under final judgment and process; and, as indicated by the statement of facts in the *Edgington* case, the trial court had jurisdiction under the act of the legislature, and correctly so held, and the prisoner was properly remanded by this court. If the trial court had been without jurisdiction, the last sentence of the opinion would be modified by our decision in the *Davis* and other cases, in which the petitioners, after final judgment, were discharged on *habeas corpus*. The same modification is true regarding *Ex Parte Winston*, 9 Nev. 71, which is also distinguishable from the present cases, because the petition was held after trial and judgment. Following the review of that case, it is said in the note at 87 Am. St. Rep. 177: "The Supreme Court of California has, on at least two occasions, inquired, in *habeas corpus* proceedings, as to whether the statute or ordinance under which the petitioner stood convicted had been repealed. See *Ex Parte White*, 67 Cal. 102, 7 Pac. 186; *Ex Parte Armstrong*, 96 Cal. 655, 24 Pac. 598. If courts, on *habeas corpus* proceedings, may inquire into the constitutionality of the statute under which the petitioner has been convicted and sentenced—and by the weight of authority they can—then we fail to see any good reason why they may not

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with equal propriety inquire into the question of the repeal of the statute. In either case, if the determination is favorable to the petitioner, there is, in fact, no statute no offense, and no judgment."

In the opinion in *Re Patzwald*, 5 Okl. 789, 50 Pac. 139, 87 Am. St. Rep. 170, it is said:

"There is no question but that at the common law, and in the absence of a statute, illegality which makes void a judgment in a criminal action, no matter by what court such judgment may have been rendered, may be inquired into on *habeas corpus*; and, if the judgment is found to be void, the prisoner may be discharged. Does our statute change this rule of the common law, and take away this right of inquiry? If such were the intended effect of the statute, our answer would be: The power is not in the legislature to take away this right. * * * That provision of the constitution (art. 1, sec. 10) is a guaranty that the right of *habeas corpus* should remain as it existed at the common law, and should not be curtailed by legislative enactment, or by subtle and metaphysical interpretation; and legislatures can no more prevent its application to cases where it would have been applicable at common law than they can abrogate the right of trial by jury. Nor do we think that it was intended by our legislature to curtail the privileges of this writ."

Opinions stating in effect that the decisions of courts holding that they have jurisdiction will not be disturbed do not apply or stand as correct in all cases, when closely analyzed. To hold otherwise would be to say that the court has jurisdiction to determine whether it has jurisdiction, and that its determination that it has jurisdiction is conclusive. This would allow any court to fix its own jurisdiction, instead of limiting it to the jurisdiction which can be fixed only by the constitution and the legislature. More correctly speaking, it is the duty of the court to determine whether it has jurisdiction of any case presented, and it has power to determine that it has jurisdiction, when conferred by the constitution and the statutes; but if the court erroneously holds that it has jurisdiction,

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when not conferred by the constitution and the laws, it cannot thereby give itself jurisdiction. The same reasoning applies to the power of the court to act in a case if the statute giving it jurisdiction has been repealed. If it determines that the statute giving it jurisdiction has not been repealed, and in fact it has not been repealed, the court properly retains jurisdiction; but if the court determines that the statute giving it jurisdiction has not been repealed, when in fact it has been repealed, the court has no jurisdiction, and would be properly restrained from attempting to exercise any, or to hold the accused in a case not provided by law.

These conclusions are illustrated by occurrences. In early times a justice of the peace tried and executed a man for murder. His determination or assumption that he had jurisdiction did not give him any; for the constitution is conclusive that no court has jurisdiction to try a man for murder, excepting the district court, upon indictment of a grand jury. Many years ago the legislature made the selling of whisky to Indians a felony. The statute was changed to make it a misdemeanor. Later the statute was again changed to make this offense a felony. The justice's court could not give itself jurisdiction to try an offender by determining that it had jurisdiction when the law made the offense a felony; and the district court could not give itself jurisdiction to try an offender when the law made the offense a misdemeanor. Hence it is proper for this court to determine whether the court or magistrate seeking to hold the petitioners in custody are clothed with jurisdiction by reason of the commission of any acts which the law, as now in force and unrepealed, makes criminal, which it is claimed on behalf of the state to have been committed by the petitioners. Any other rule of construction might deny to the law-abiding citizen the just protection and release from custody under a writ of *habeas corpus*, guaranteed to him by the constitution, and which courts and judges having power to issue the writ are under statutory penalty to issue, when proper application is made.

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A court cannot confer jurisdiction upon itself through an indictment or other criminal complaint, when the acts committed do not constitute an offense. This jurisdiction is fixed by the constitution, which gives the district court jurisdiction in felony cases and the justice's court in misdemeanors, and by the legislature, which designates the acts which constitute felonies and misdemeanors. The court or a grand jury, by a statement in an indictment that they accuse a person of felony, cannot make him guilty of or properly triable for felony, if the act he has committed is not made felonious by law. If an indictment should charge a person with felony for smoking cigars or drinking alcohol, or cooking on Sunday, which was an offense in early colonial times, such an indictment would not give a district court in this state any jurisdiction to try the accused, and if held in custody for trial he would be properly released on *habeas corpus*; the purpose of the writ being to release the citizen whenever he is unjustly or illegally restrained. It is evident that any person ought to be discharged from arrest when it is clear and undisputed that he is held by reason of the commission of some act which the law does not prohibit, or has not penalized.

Notwithstanding it must be clear that an act is prohibited and penalized before any person is punishable or properly triable for its commission, it is evident that it is sought to punish or to remove for trial petitioners under a part of the indictments, because they were directors and officers of a bank which went into the hands of a receiver, although they were not in the bank, and did not personally receive deposits, at the time the bank is claimed to have become insolvent. Apparently it is sought to have a part of the petitioners tried and punished because they were directors of the bank, when not present or residing in the county where the bank was situated, on the assumption that, because they were such directors and officers, the inference would follow that they were receiving the deposits, assenting to and conniving at the reception of deposits which were being

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received by the bank through its cashiers. But the statute which controls nowhere by its terms provides any penalty against petitioners or persons for merely acting as directors or officers of a bank, whether solvent or insolvent, or when receiving deposits and insolvent, except against officers or persons actually receiving deposits for the bank, knowing that it is insolvent.

Bringing new indictments after the petitioners have been discharged upon *habeas corpus*, and adding or omitting words in the charging part which cannot be supported by any evidence, does not bring the accused within the jurisdiction of the court, if we follow the mandate of the statute by hearing evidence and considering undisputed facts, and they show that the accused were not within the jurisdiction of the court, or did no act which the legislature has made punishable. Merely alleging that they received the deposits, when the evidence is clear that they were not in the county and not present, does not give the court jurisdiction to try them, when the statute provides no penalty for their acting as directors and officers of the bank, even if it was insolvent, and when the *habeas corpus* act directs that we hear the testimony and discharge the petitioners, if it is sought to hold them in a case not provided by law.

Although an indictment is the highest species of criminal complaint, no good reason appears why it should be more invulnerable than the judgment of a court, nor why it may not be attacked as readily as a judgment, when it is found in a tribunal which is without jurisdiction, and some discretion exercised in regard to setting it aside in proper cases. These will rarely occur. But whenever it is clearly shown that the court is without jurisdiction, because the acts for which it is sought to punish the accused are not criminal, or, if penalized, that the jurisdiction over them is exclusively in some other court, any judgment or indictment in any court so without jurisdiction is void, and does not authorize the detention of any person accused. In every such case he should be discharged as readily as if held under an indictment or

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judgment for murder before a justice of the peace, or an indictment or judgment for walking on the street after dark before any court.

As the indictment is not conclusive against the objection that the court is without jurisdiction, but is presumptive evidence of the truth of its allegations, and the court can consider the evidence and the real facts, the burden of showing which clearly, in order to overcome the indictment, is upon the petitioners, the questions presented here, relating to whether the petitioners, who were not in Eureka, or at the bank, can be properly held under the indictment charging the receipt of deposits, are controlled or concluded by the cases of *Ex Parte Smith* and *Ex Parte Griffin*, two of the petitioners here, who were discharged under former indictments found in Eureka County and growing out of the closing of the same bank. Regarding those cases, we said in the opinion (33 Nev. 470): "Under the allegations of the indictment, which appears to have been carefully drawn, and which allegations, we understand from the admissions by the prosecution, state the correct facts, it does not appear that they constitute any offense known to the law. However, if the state or the grand jury has any evidence which would bring the case under the terms of the statute, or show that the defendant had authority to close the bank or prevent the reception of deposits therein when he knew the bank was insolvent and in failing circumstances, or if they have any evidence that he actually or personally received any deposit for the bank when he knew it was insolvent and in failing circumstances, or that he was an accessory to such reception under section 10 of the act covering crimes and punishments and the decisions of this court concerning the same, a new indictment alleging the necessary facts may be found, and, if so found, it will not be prejudiced or affected by the order in this proceeding."

Under these later indictments, pertaining to the offenses last mentioned, allegations, without evidence to support

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them, have been inserted apparently for the purpose of holding the petitioners for trial, regardless of the decision of this court discharging the ones who applied in the former proceeding, and when the prosecution does not have, or claim to have, or offer, evidence of the commission of acts by the petitioners, which would sustain the allegations of the indictment, or make the petitioners guilty of any act amounting to the commission of a crime by receiving deposits, or conniving at or assenting to the reception of deposits in that county or elsewhere, while knowing the bank was insolvent. In holding in the former case (33 Nev. 466) that a person is not guilty, under the statute, of the offense of assenting to the receipt of a deposit, unless he has some inherent power to withhold assent, we said: "As these officers, when they have this authority, are made guilty when they fail to prevent the reception of deposits, knowing the bank is insolvent or in failing circumstances, evidently the legislature did not intend to make them guilty of the reception of deposits when they did not have this authority, unless they actually received the deposit.

* * * If the specific provision in section 2, that officers having power to close the bank or prevent the reception of deposits shall be deemed guilty of assenting to the reception of deposits if they fail to exercise this authority, has been omitted from the statute, or could be ignored, still there is nothing in the language of section 1, nor in the law which makes an officer of an incorporated bank criminally liable, simply because he is such officer and knows that the bank is insolvent, and, without anything being done on his part, deposits are being received by some other officer or person for the bank."

We held that every person who might know that the bank was receiving deposits, such as a janitor, messenger, or telegraph operator, would not be guilty of assenting to the reception of deposits, even if present and knowing that such deposits were being made, and he was not authorized to prevent such reception or to close the bank.

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If the state has no evidence which would make the petitioners guilty under this construction and these requirements, and none is offered or suggested to overcome the evidence introduced by the petitioners, it would seem that an effort is being made to hold the petitioners for trial in the cases last mentioned, contrary to the statute and the decision of this court discharging Smith and Griffin from custody under the former indictment, which decision suggested that new indictments could be found if there was evidence indicating guilt, but did not contemplate the finding of further indictments there, unless there was evidence showing that the accused had committed acts which constituted crime within the jurisdiction of the court.

The evidence here indicates that the petitioners, other than the cashiers who actually received deposits in the bank for the bank, were absent from the bank; and it is not shown that there is any evidence to indicate that they were authorized to close the bank or prevent the reception of a deposit or assent to its reception, excepting that they were individual and absent officers of the bank when it was doing business and receiving deposits through its cashier.

In a noted case, *Ex Parte Jenkins*, 2 Wall. Jr. 521, Fed. Cas. No. 7,259, the petitioners were three times arrested and three times discharged by writs of *habeas corpus*, the last arrest being under an indictment charging an assault with intent to kill. As here, for the purpose of holding and trying the accused, new indictments had been drawn, with allegations indicating the commission of an offense, when, under the real facts, none had been committed. On the hearing in the *habeas corpus* proceedings evidence was admitted to show that the petitioners were acting as deputy marshals of the United States in attempting to execute a warrant at the time of the assault, and consequently were justified and not guilty, and entitled to be discharged. "In all the cases it was held that the returns to the writs of *habeas corpus* were not conclusive, and that evidence would be received

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of the actual state of the facts complained of in the prosecutions in the criminal cases and relied on in the civil action." (Hurd on *Habeas Corpus*, p. 149.)

In regard to the repeated charges against the petitioners, the evidence being uncontradicted that they were not in that county, or did not commit any act which the law makes criminal or over which the court has jurisdiction, the finding of an indictment with additional allegations supplied for the purpose of alleging an offense when the state does not have evidence to support the additional allegations of new indictments, or tending to show that an offense was committed, does not warrant the holding of a citizen in custody for trial. Where there is no probable cause, and no claim on the part of the state that he has committed any act which is an infraction of the law, when properly construed, he is entitled to his discharge.

Considering that section 1 of the statute makes it an offense for assenting to or conniving at the receipt of deposits, and section 2 goes further and provides that while officers shall be deemed to assent to the reception of deposits when they are authorized to close the bank or prevent the reception of deposits and fail to exercise such authority, and this court having held that persons merely acting as officers are not guilty of assenting to the reception of deposits when they are not specially authorized to close the bank or prevent the reception of deposits, it is apparent that they are not guilty of conniving at the reception of deposits when they do nothing to induce the making or reception of a deposit, except to serve as officers of a bank which is doing business. To be guilty of conniving requires some affirmative action, at least as much, if not more, than assenting.

We can imagine that in many ways officers of an incorporated bank might connive at the reception of deposits by advising or inducing the making or reception of deposits in the bank. It is not claimed that the petitioners did anything by way of conniving at the making or reception of deposits, except to act as officers of the bank. Therefore the circumstances fail to contain the

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necessary elements to constitute the crime of conniving at the reception of deposits, as well as to constitute the crime of assenting to the reception of deposits. Omitting the indictments against the cashiers who actually received the deposits, indictments are found against other petitioners for assenting to the reception of deposits, conniving at the reception of deposits, and for actually receiving deposits, when they were not in the county or at the bank. It seems that it is sought by the district attorney, and counsel especially employed to assist him, to sustain all these charges under some sort of inference that, because a person is a director or officer of a bank, he is guilty of receiving, assenting to, and conniving at, the reception of a deposit received by the bank through the cashier or some other officer, who actually receives a deposit over the counter of the bank. If this theory were sustainable, the directors of the bank would become guilty of three offenses for each deposit so received while they knew that the bank was insolvent, merely by the inferences sought to be enforced that the directors are guilty of receiving the deposit, of assenting to and conniving at the reception of the deposit, when they may be away from the bank or out of the county, or out of the state, and do nothing in relation to the deposit.

Under the well-established rules of law, no person is to be three times, nor once, punished by inference; and the legislature has not said that it constitutes felony, or any offense, for a person to act as a director and officer of an insolvent bank which is doing business and receiving deposits, excepting that such director or officer has authority to close the bank or prevent the reception of deposits and fails to exercise such authority, in which case he is made guilty of assenting to the reception of deposits. Following the rule in regard to corporations in other cases, that the director or officer has no power to close the bank or prevent the reception of deposits, unless specially authorized—and it is not claimed here that any of the petitioners were specially authorized to close the bank or prevent the reception of deposits—under these

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circumstances, did the petitioners, other than the ones who actually received the deposits, receive the deposits in law, or assent to or connive at the reception of deposits? The receipt by the cashier or teller of an individual banker would be the receipt by the banker in his absence, and the same would be true in regard to a partnership. It might be said that any one of the partners in a banking business would have the right to control and manage the business, the same as any partner in any other business; and that the partner who did not prevent the reception of a deposit, when he knew it was being received by the cashier or teller, would be assenting to the reception of a deposit. But in the case of a banking corporation the receipt by the cashier or teller is the receipt by the corporation, and not for the cashier or teller or for an officer of the bank; and a director or officer of an incorporated bank is not empowered to close the bank or prevent the reception of deposits, merely because he is such director or officer.

In the Rickey case we held that a deposit made in an incorporated bank was, in law, a receipt by the bank, and not a receipt by a director or officer of the bank who did not personally receive the money. We said: "The doctrine seems to be settled, without any conflict whatever, that in the case of an incorporated bank the receipt, in law, is by the corporation itself; that under facts as stated in the indictment in this case both the defendant and receiving teller were agents of the same principal, to wit, the corporation; and that, as between themselves, no relationship of principal and agent was involved. The assertion made by counsel for the state in their brief that 'the receipt of a deposit by an employee of an insolvent bank is the act of the president, or other officer having authority over the employee,' is not only not supported by any authority cited by them, but is opposed by the whole current of authority, both of text-writers and decisions of courts." (31 Nev. 104; 135 Am. St. Rep. 651.)

If the petitioners here had been private bankers, it might be claimed that the receipt of a deposit through

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the cashier or teller at the bank in Eureka was a receipt by the petitioners, although they were absent from the county, because, in law, the receipt would be for their personal benefit. The provisions of the statute penalizing the receipt of a deposit cannot be construed to apply to the directors or officers of an incorporated bank merely because they are such directors or officers, when they have taken no action whatever in regard to the reception of deposits, and are absent from the county or the bank, although they are aware that the bank is, and for many years has been, doing business. Nor, under the language of the statute, does the mere fact that a person is an officer or director of a bank make him guilty of assenting to or conniving at the reception of a deposit.

The statute does not say that any person who is a director or officer of a bank shall be guilty of felony, merely because he is such officer and knows the bank is receiving deposits through some other officer when it is insolvent. That is all it appears the petitioners here did, excepting the ones who actually received the deposits; and nothing appears to combat the showing that they were not aware that the bank was insolvent before it closed. Under the rule stated, they are liable only for acts which are clearly made criminal; and it is not provided by the statute that they shall be liable for felony, merely because they were directors of the bank, absent at the time the deposits were received, even if they had known that the bank was insolvent.

There is testimony that petitioner Gorman, who had recently assumed the position of cashier of the bank, was not aware of the value of its securities. It does not appear that he and Golding, who preceded him as cashier, knew that the bank was insolvent, if it was insolvent, at the time it closed, or before the securities were shrunk by the panic or taken over for forced sale by the receiver. The receipt of deposits by them, if they did not know that the bank was insolvent, or if it did not become insolvent until later, did not constitute an offense.

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On petitioners' behalf it is urged that the stockholders only would have power to close the bank, but regarding this we need not determine in this proceeding; for if it be conceded that the general management of the bank is vested in the board of directors, as it is ordinarily with all corporations, there is no pretense here that the board of directors were in session at any time when the bank is claimed to have been insolvent, or that any of the petitioners were ever authorized by the stockholders or the board of directors to close the bank or prevent the reception of deposits. Clearly no director or officer of the bank could have the power to close the bank or prevent the reception of deposits when unauthorized by either the board of directors or the stockholders; and there is no pretense here that any attempt was ever made by either the board of directors or the stockholders to confer authority upon any of the petitioners to close the bank or prevent the reception of deposits.

We can imagine a case in which the directors could be in session, and it might be contended that one director, having the casting vote when there was a tie, would have the authority to close the bank by voting for a resolution for the purpose.

Not only does the statute provide no punishment for being a director of a bank that fails, but it provides no punishment against the directors or officers of a failing bank for omission to call a directors' meeting to determine whether the bank shall be closed, or whether authority shall be delegated to some one to close it. Until a director or officer is given authority to close the bank and prevent the reception of deposits, he has no authority inherently or by law, and consequently, under the circumstances shown, is not guilty, unless he received the deposit personally. There is no pretense here that the petitioners, who are shown to have been absent from the county and the bank, or the cashiers at the counter, had been given any authority by either the board of directors or the stockholders to close the bank, or to prevent the reception of deposits by the bank.

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As to whether, if a meeting of the board had been called for the purpose of determining whether the bank should be closed, a part or all of the petitioners would have appeared and voted to close the bank, we need not speculate. Under the conditions—a bank open, doing business, and receiving deposits for many years—the mere facts that the directors or officers of the bank are such officers or directors, that deposits are received by the cashier when he does not know that the bank is insolvent, and that the bank closes, or is closed by the bank examiner, whether solvent or insolvent, does not constitute any offense under the statute.

Under ordinary circumstances, and in cases where no proof was submitted by the petitioners, indictments such as these would be sufficient for holding persons accused; but it would seem that under our statute, and under the decisions of courts in other jurisdictions which have statutes providing for the taking of testimony in *habeas corpus* proceedings, the indictments are *prima facie* evidence that the accused are properly charged and ought to be held for trial, unless the accused show clearly that there is no evidence which justified the finding of the indictment or warranting the holding of the accused for trial. If there is any evidence indicating that the accused committed the crime with which he is charged, or evidence of such a character that a trial jury could consider it, act upon it, and find a verdict upon it which would be sustained by any substantial evidence, the accused ought to be remanded for trial, and not discharged on *habeas corpus* proceedings, no matter how much evidence the accused may have to show innocence; for as soon as a substantial conflict is raised in the material testimony relating to guilt there is something to try, something for a trial jury to act upon, and something for which the accused ought to be remanded for trial. But when, as in these cases, the petitioners introduce testimony indicating that they committed no acts which constitute an offense triable by or within the

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jurisdiction of the district court of Eureka County, and the state offers no testimony or claim to contradict this, justice and the plain language of our *habeas corpus* act demand their discharge. Under this construction, the allegations in the indictments are presumed to be correct, in the absence of any testimony on the part of the accused; but this presumption of the correctness of the indictments may be overthrown by clear proof on the part of the accused, uncontradicted by the state, indicating that there is not evidence to sustain the material allegations of the indictments. But, if the state had any substantial evidence to sustain the material allegations of the indictments, the indictments would be conclusive to the extent of requiring the remanding to custody of the accused for trial.

The state does not offer or indicate that it has any evidence to contradict the testimony on the part of petitioners, or to show that the ones who were absent from the county committed any criminal acts there, or that petitioners knew the bank was insolvent at the time of the commission of any of the acts with which they were charged, or that the assets of the bank, before they were taken over for forced sale by the receiver, or until shrunk by the panic or forced sale of the receiver, were not ample to meet its obligations. Without evidence showing that the accused were aware that the bank was insolvent at the time of the commission of the acts with which they are charged, they were not punishable for any offense; and the state could not sustain a conviction. If the state is without evidence in this regard, or without other evidence to bring the cases within the jurisdiction of the court and sustain a conviction, it is far better for all concerned that the accused be discharged now. In the small town and county of Eureka, with only a few hundred qualified jurors, and with a few hundred depositors in the closed bank, the difficulty of securing a jury and the heavy expense incidental to the different trials of these petitioners under the various charges might

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well-nigh bankrupt the county. And although no expense, however great, ought to prevent the trial of persons properly charged, against whom there is evidence to sustain a conviction, if there is no evidence to sustain a conviction for any offense within the jurisdiction of the court, the reasons are equally strong and apparent for discharging the petitioners now and saving the trouble and the great expense necessary for such trials, and of avoiding injustice to the accused by requiring them to defend through trials, when it is apparent now that they have not committed acts which the law makes criminal, or for which judgments of conviction against them could be sustained. If it clearly appears that the acts, for the commission of which it is sought to punish the accused, do not constitute an offense, the court is as much without jurisdiction before as after the trial; and it is better that they be discharged before instead of after trial.

A general act regulating banking was passed and approved March 24, 1909. This was superseded by a general act to regulate banking, passed at the next session of the legislature and approved March 22, 1911. Section 22 of the earlier act is as follows: "Any person who shall wilfully and knowingly subscribe to, or make, or cause to be made, any false statement or false entry in the books of any corporation transacting a banking business under this act, or who shall knowingly subscribe to or exhibit false papers, with the intent to deceive any person or persons authorized to examine into the affairs of any such corporation, or shall make, state or publish any false statement of the amount of the assets or liabilities of any such corporation, shall be deemed guilty of a felony and upon conviction thereof shall be imprisoned in the state penitentiary not less than one year nor more than five years." (Stats. 1909, p. 257.)

Section 16 of the later act is as follows: "Every officer, director, proprietor, partner, agent or clerk of any bank doing business under the laws of the State of Nevada, who knowingly or willingly subscribes to, or makes any false report or makes any false statement or entries in

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books of such bank, or knowingly subscribes to or exhibits any false writings on paper with the intent to deceive any person or persons as to the condition of such bank, shall be deemed guilty of a felony, and shall be punished by a fine not to exceed one thousand dollars or by imprisonment in the state prison not to exceed five years, or by both such fine and imprisonment." (Stats. 1911, p. 297; Rev. Laws, 631.)

As part of the sections refer to similar matters and part of the language in both is the same, it is apparent that section 16 of the later act refers to and has worked over the subject-matter of section 22 of the earlier act. It will also be observed that the drastic provision in section 22 of the earlier act, making it a felony for any person to publish any false statement of the amount of the assets or liabilities of any bank, with a penalty of imprisonment from one to five years in the state penitentiary, has been omitted from the later act. The language of the earlier act was broad enough to make any person, including a newspaper proprietor, who might publish such a false statement without even knowing it to be false, liable to this penalty. Good reason may have appeared to the legislature for omitting from the later act a provision so dangerous. A general and comprehensive law, working over a former act and covering the subject-matter, supersedes and repeals the former act by implication, except as otherwise indicated.

In *State v. Lee*, 28 Nev. 389, we said: "A careful comparison of the two acts, however, leads to the conclusion that, under a well-settled rule of statutory construction, the entire act of 1899 is repealed by the act of 1905. The act of 1905 is a comprehensive measure, complete in itself, revising the whole subject-matter of the act of 1899, and evidently intended as a substitute for it, although it contains no express words to that effect. In the case of *Bartlet et al. v. King, Executor*, 12 Mass. 537, 7 Am. Dec. 99, the rule applicable to this case was stated as follows: 'A subsequent statute, revising the whole subject-matter of a former one, and evidently intended as a substitute

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for it, although it contains no express words to that effect, must, on the principles of law, as well as in reason and common sense, operate to repeal the former.' This court has heretofore twice quoted with approval the rule as above declared in the Bartlet case, and it is supported by abundant authority from other courts. (*Thorpe v. Schooling*, 7 Nev. 15; *State v. Rogers*, 10 Nev. 319; *Mack v. Jastro*, 126 Cal. 132, 58 Pac. 372; *State Board of Health v. Ross*, 191 Ill. 87, 60 N. E. 811.) See, also, 26 Am. & Eng. Ency. Law, 2d ed. 731, and authorities cited in note 4." (*Union Trust Co. v. Trumbull*, 137 Ill. 146, 27 N. E. 24.)

Section 77, in the body of the later act relating to banking, provides: "All acts and parts of acts in conflict with the provisions of this act are hereby repealed, but such repeal shall not affect any civil actions or rights of action nor the prosecution of any person or persons for any offenses which may now exist or which have been heretofore committed under existing laws."

It will be noticed that the language of this section continues the right of action and prosecution under, and refers only to, acts and parts of acts in conflict with the later act. Acts and parts of acts not in conflict are not covered by the language of, or affected by, this provision, and are not continued in force by it, if they would have been repealed by implication or otherwise without it. The provision in the earlier act, making it a penalty to publish a false statement, is not in conflict with the provisions of the later act, which make no reference to the publication of a false statement, and therefore is not continued in force by the language of section 77. Both acts penalize the making of any false statement or false entry in the books of the bank, and certain other acts for which a conflicting or different penalty is specified in the two acts; the earlier one providing imprisonment for not less than one nor more than five years, and the later act a punishment by fine not exceeding \$1,000 or by imprisonment not exceeding five years, or by both such fine and imprisonment.

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By the express provision of the later act, the penalty of the earlier act is continued as a punishment for the commission of any act made criminal by both acts; but an act made criminal by the earlier act and not made criminal by the later act, not being in conflict with the later act, is not continued in force by the language of the later act, and is superseded and no longer in force or punishable, under the ordinary rule relating to repeals. Knowingly subscribing to a false report, and other acts, by an officer, director, proprietor, agent, or clerk of a bank are still punishable in the county where the report is subscribed or act committed; but there is no statute now in force penalizing the mere publication of a false report. If the reports sworn to in other counties were false, the liability for prosecution for perjury is in the county where the oath was taken.

In the brief we have been referred to a number of cases where indictments were held void or have been set aside. In these cases there was no valid grand jury, and the objections were generally made upon the ground that the indictment was found by a grand jury consisting of more or less than the number required by statute, or that the grand jury had not been impaneled by the officers authorized by law, or the questions arose upon appeal or in proceedings other than an application for a writ of *habeas corpus*.

It is contended that the indictments are void, because the district judge selected one of the county commissioners who was blind to act with him in drawing the grand jury. It was shown that this county commissioner had been in office for sixteen years, and had often assisted in the drawing of grand juries. In view of the presumption that officers do their duty, in the absence of any showing to the contrary, it is assumed that this county commissioner did his, and that the clerk and judge in drawing and certifying for the grand jury did theirs, and notwithstanding that he could not see that the men he selected for the grand jury were properly selected and

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certified. The evidence that he was a capable county commissioner, of long experience, and that the names he selected for grand jurors were taken down. We do not think the fact that he had the misfortune to be blind would render the indictments void, or justify the release of petitioners from custody under the bench warrants. Milton and an eminent United States senator, who is rendering valuable service to the nation, are but illustrations of men without eyesight who have great minds and are more capable than ordinary mortals.

It is urged that the indictments ought to be set aside or held void by reason of certain conduct and prejudice of the district judge. There is testimony that he was bitter in denunciation of the officers of the bank; that he published a statement in the newspaper, and also denounced them at a citizens' meeting in the opera house called by him by printed notices; and that he said at the public meeting he would rather take any train robber, than Gorman or Oscar J. Smith, as receiver. Referring to the bank management, the district judge stated in his court that they had three qualifications for successful road agents to one for successful banking. He states that these remarks were not directed to the petitioners in particular, but more generally to bank wreckers, and that the meeting in the opera house was called by him for the purpose of answering statements which had been made by a candidate for governor. He announced his disqualification to preside at the trials of any indictments that might be found against the officers of the bank. Inference could have been drawn from the fact that this bank was the only one which had failed or had been doing business for many years in Eureka County. He states that a coterie in Eureka were backbiting him and had insulted his receiver, and were hampering him in the liquidation of the bank's affairs, and that in reference to them he said he "would bring the scoundrels before the next grand jury."

It is claimed that the conduct of the district judge shows such extreme prejudice on his part that the

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petitioners ought to be discharged, because he ordered and participated in drawing the grand jury. It is generally held that the prejudice of the judge or the bias or disqualification of a grand juror is not ground for setting aside indictments by writs of *habeas corpus*. Section 7090 of the Revised Laws provides that an indictment must be set aside by the court in which the defendant is arraigned, upon motion, when the defendant has not been held to answer before the finding of the indictment, on any ground which would have been good ground for challenge, either to the panel or to an individual grand juror. Section 7004 provides the grounds for challenge to the panel; and section 7005 provides that a challenge to an individual grand juror may be interposed upon the ground that "a state of mind exists on his part in reference to the case, or to either party, which will prevent him from acting impartially and without prejudice to the substantial rights of the party challenging." From this it will be seen that if any of the grand jurors were depositors in the bank, or from other cause had such a prejudice as would prevent them from acting impartially, the petitioners would have their remedy by motion to set aside the indictments upon arraignment in the district court, and not in this proceeding.

Among the cases holding that objections to grand jurors are limited to the grounds provided by statute are *Ex Parte Winston*, 9 Nev. 71; *In re Twohig*, 13 Nev. 302; *People v. Smith*, 118 Mich. 73; *Territory v. Hart*, 7 Mont. 42, 14 Pac. 768; *Johnson v. State*, 62 Ga. 179.

In *Keizo v. Henry*, 211 U. S. 146, 29 Sup. Ct. 41, 53 L. Ed. 125, the court said: "Unquestionably, if the trial court had exceeded its jurisdiction, a prisoner held under its judgment might be discharged from custody upon a writ of *habeas corpus* by another court having the authority to entertain the writ (*Ex Parte Lange*, 18 Wall. 163, 21 L. Ed. 872; *Ex Parte Siebold*, 100 U. S. 371, 25 L. Ed. 717; *Ex Parte Yarbrough*, 110 U. S. 651, 4 Sup. Ct. 152, 28 L. Ed. 274; *Ex Parte Wilson*, 114 U. S. 417, 5 Sup. Ct. 935, 29 L. Ed. 89), although even in a case of this kind a court

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will sometimes refrain from releasing a prisoner upon writ of *habeas corpus*, and will remit him to his remedy by writ of error. (*Riggins v. United States*, 199 U. S. 547, 26 Sup. Ct. 147, 50 L. Ed. 303; *Urquhart v. Brown*, 205 U. S. 179, 27 Sup. Ct. 459, 51 L. Ed. 760.) But no court may properly release a prisoner under conviction and sentence of another court, unless for want of jurisdiction of the cause or person, or for some other matter rendering its proceedings void. Where a court has jurisdiction, mere errors which have been committed in the course of the proceedings cannot be corrected upon a writ of *habeas corpus*, which may not, in this manner, usurp the functions of a writ of error. (*Ex Parte Parks*, 93 U. S. 18, 23 L. Ed. 787; *Ex Parte Siebold*, 100 U. S. 375, 25 L. Ed. 717; *Ex Parte Yarbrough*, *supra*; *Ex Parte Wilson*, *supra*; *Re Delgado*, 140 U. S. 586, 11 Sup. Ct. 874, 35 L. Ed. 578; *United States v. Pridgeon*, 153 U. S. 48, 59, 63, 14 Sup. Ct. 746, 38 L. Ed. 631, 635, 637; *Andrews v. Swartz*, 156 U. S. 272, 276, 14 Sup. Ct. 389, 39 L. Ed. 422, 423; *Riggins v. United States*, *supra*; *Felts v. Murphy*, 201 U. S. 123, 26 Sup. Ct. 366, 50 L. Ed. 689; *Valentina v. Mercer*, 201 U. S. 131, 26 Sup. Ct. 368, 50 L. Ed. 693.)

"Disqualifications of grand jurors do not destroy the jurisdiction of the court in which an indictment is returned, if the court has jurisdiction of the cause and of the person, as the trial court had in this case. (*Ex Parte Harding*, 120 U. S. 782, 7 Sup. Ct. 780, 30 L. Ed. 824; *Re Wood*, 140 U. S. 278, 11 Sup. Ct. 738, 35 L. Ed. 505; *Re Wilson*, 140 U. S. 575, 11 Sup. Ct. 870, 35 L. Ed. 513.) See *Re Moran*, 203 U. S. 96, 104, 27 Sup. Ct. 25, 51 L. Ed. 105, 108. The indictment, though voidable, if the objection is seasonably taken, as it was in this case, is not void. (*United States v. Gale*, 109 U. S. 65, 3 Sup. Ct. 1, 27 L. Ed. 857.) The objection may be waived, if it is not made at all or delayed too long. This is but another form of saying that the indictment is a sufficient foundation for the jurisdiction of the court in which it is returned, if jurisdiction otherwise exists."

In *Allen v. Reilly*, 15 Nev. 455, it was said: "Defendant

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then moved for a change of venue, on the ground that he could not have a fair and impartial trial before the judge presiding, because he and defendant had been, and then were, bitter personal enemies. The motion was supported by the defendant's affidavit setting out the facts just stated; but it was denied by the court. The judge was not disqualified under the statute. (Comp. Laws, 950.) It is held in California that bias or prejudice on the part of the judge, even in a criminal case, constitutes no legal incapacity to sit on the trial of a case, and is not sufficient ground to authorize a change of the place of trial. (*People v. Williams*, 24 Cal. 33.) And so it was held in a civil case (*McCauley v. Weller*, 12 Cal. 523). This is especially true when a jury finds the facts; for, if a court errs in matters of law, its errors may be corrected as effectually on appeal taken by an enemy as by a friend. Besides, the presumption is that the court will not be influenced by the animosities of the judge, if such he has."

An act of the legislature passed in 1895 (Stats. 1895, p. 64) provided that upon the filing of an affidavit of the prejudice of the district judge another judge should be called to try the case. This statute gave an opportunity for parties to avoid trial before a judge that they did not desire to have try the case for other reasons than bias; and it was repealed at the next session of the legislature. (Stats. 1897, p. 88.) Section 4865 of the Revised Laws provides that a judge shall not act in a case in which he is interested, or where he is related to one of the parties within certain degrees by blood or affinity. The law has more safeguards against the prejudice of jurors than against the bias of judges; for the errors of judges, relating to matters of law, are generally more easily corrected on review than the unjust action of jurors, caused by prejudice or undue feeling.

The framers of our constitution were careful to preserve the right of trial by a fair and impartial jury, and article 6, section 12 (Rev. Laws, 327), provides that "judges shall not charge juries in respect to matters of

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fact." Under this section, verdicts of conviction have been uniformly set aside, where the judge expressed an opinion or intimated before the jury that the accused was guilty. Cases so holding are cited under section 327, Revised Laws. Verdicts have also been set aside because of the improper remarks of the district attorney, the officer selected to prosecute offenders, and who is not under the same solemn duty as the judge to hold the scales of justice impartially between the accused and the state. (*State v. Rodriguez*, 31 Nev. 342; *State v. Petty*, 32 Nev. 384.)

After such denunciation in public places, in court, in the public press, and at a public meeting by the highest judicial officer in the community, it is not probable that in the county, with a small population, any jury would be obtained without members who had heard, heard of, or been influenced by, the condemnation of the judge.

The reasons stated in some cases holding that the bias of the judge does not prevent him from acting, because his errors may be corrected on appeal, would seem to be good and sufficient in cases where the error can be detected and corrected on appeal. Whether there should be an exception to the rule in cases where the reason for it fails, or in matters where the judge acts upon his discretion in the selection of grand jurors, in regard to which it cannot be known whether any bias or feeling influenced the selection, and whether the bias of a judge may be so extreme in any case as to warrant the setting aside of an indictment, on the theory that the constitution, regardless of the lack of statutory provision, entitles the citizen to be released from it or a bench warrant under it, we need not determine, in view of the order which is to be made in this proceeding. It is the rule that constitutional questions will not be determined, unless their determination is necessary for a disposition of the case. (*Burling v. Goodman*, 1 Nev. 314; *State v. Meder*, 22 Nev. 264; *State v. Stoddard*, 25 Nev. 452, 51 L. R. A. 229; *State v. Curler*, 26 Nev. 347.)

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The cases, having been argued and submitted together, and being so allied, have been determined together. The petitioners will stand discharged, and the clerk will make an order in each of the above-entitled cases accordingly.

ON PETITION FOR REHEARING

Per Curiam:

Respondents have petitioned for a rehearing. The effect of granting a rehearing would be to suspend the former order discharging the petitioners. (3 Cyc. 219.) This would subject petitioners to rearrest upon the very charges upon which they have been discharged in violation of section 29 of the *habeas corpus* act. (Rev. Laws, 6254.) Under statutes like ours, the Supreme Court of California has held that there is no practice in that state allowing petitions for rehearing in cases of *habeas corpus*. (*Ex Parte Robinson*, 71 Cal. 608.) Except where there is statutory provision therefor, an order discharging a prisoner has generally been held not subject to review. (21 Cyc. 335, *et seq.*) It has been held that to allow a review of an order of another court made in a *habeas corpus* case is inconsistent with the object of the writ. (*Wyeth v. Richardson*, 10 Gray, 240; *Knowlton v. Baker*, 72 Me. 202; *State v. Miller*, 97 N. C. 451, 1 S. E. 776; *People v. Schuster*, 40 Cal. 627; *Grady v. Superior Court*, 64 Cal. 155, 30 Pac. 613; *In re Clasby*, 3 Utah, 183, 1 Pac. 852.)

The petition for a rehearing is denied.

REPORTS OF CASES
DETERMINED IN
THE SUPREME COURT
OF THE
STATE OF NEVADA

OCTOBER TERM, 1912

[No. 2026]

STATE OF NEVADA, RESPONDENT, *v.* C. W. KING,
APPELLANT.

1. LEWDNESS—STATUTORY OFFENSE—INDICTMENT.

An indictment alleging that accused wilfully, unlawfully, and feloniously lived with a female named, the female being a common prostitute, charges the offenses denounced by Rev. Laws, 6445, punishing every person who shall live with a common prostitute.

2. INDICTMENT AND INFORMATION — STATUTORY OFFENSES — SUFFICIENCY.

An indictment charging an offense in the language of the statute on which it is based is sufficient, where the statute sets forth, without uncertainty, the elements necessary to constitute the offense.

3. PROSECUTING ATTORNEY—ARGUMENT.

Remarks of the district attorney in argument based on the evidence in the case will not be regarded as improper.

4. APPEAL AND ERROR—ASSIGNMENTS, WHEN DISREGARDED.

Assignments of error not referred to in brief or oral argument do not require consideration.

APPEAL from the Second Judicial District Court, Washoe County; *Thomas F. Moran*, Judge.

C. W. King was convicted of the crime of living with a common prostitute, and appeals. **Affirmed.**

The facts sufficiently appear in the opinion.

Argument for Appellant

Mark Walser, for Appellant:

The indictment does not contain any statement of facts constituting the offense. The living with might have been innocent of wrong doing. It might have been under the sanctity of marriage. It might have been under the relationship of landlord and tenant, or in many ways not in contemplated violation of the law. Had the defendant pleaded guilty, it would have been manifestly impossible for the court to know, from the indictment, in what manner the defendant committed the offense with which he is charged. (Rev. Laws, 7050; *State v. Topham*, 123 Pac. 888.)

The want of a direct allegation of anything material to the description of the subject, nature or manner of the offense cannot be supplied by any intendment or implication. (*State v. Logan*, 1 Nev. 89, 110; *People v. Seviars*, 14 Cal. 29; *People v. O'Brien*, 96 Cal. 171.)

Even if the exact language of the statute is followed, it may be insufficient. (*People v. Conness*, 150 Cal. 114.) When an act becomes criminal only when performed with particular intent, that intent must be alleged and proved where specific intent is an element of the offense. No presumption of law will ever decide the question of intent. (*People v. Johnson*, 39 Pac. 622; *Board of Medical Examiners v. Eisen*, 123 Pac. 52.)

In order that an information merely in the words of the statute may be sufficient, the words of the statute themselves "must fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offense intended to be punished, and must state all the material facts and circumstances embraced in the definition of the offense." (*Evans v. United States*, 153 U. S. 587; *United States v. Carri*, 105 U. S. 611; *People v. Perales*, 141 Cal. 581; *Commonwealth v. Milby*, 24 S. W. 625; *State v. Frazier*, 53 Kan. 87.)

The indictment contains the word "wilfully" which in law means "knowingly," and having been plead, it then became necessary for the state to establish by testimony that the defendant knew Mildred Deneve was

Argument for Respondent

a common prostitute, and so knowing "did live with her." "Wilfully" is a strong word, much stronger than "intentionally." It means governed by will, obstinate. (*Johnson v. State*, 61 Ala. 9; *Garza v. State*, 47 S. W. 983; *Green v. State*, 122 Pac. 1108.)

"To live with" means that the parties must actually "dwell and abide together." (*Bird v. State*, 11 S. W. 641; *Massey v. State*, 66 S. W. 911.)

An information charging a person with being a common prostitute without stating any fact or circumstance showing or tending to show she was a prostitute, is insufficient. (*Delano v. State*, 66 Ind. 348, 32 Cyc.)

Cleveland H. Baker, Attorney-General, for Respondent:

The indictment is in proper form. (Rev. Laws, 7051; *State v. Millain*, 3 Nev. 409; *State v. Chamberlain*, 6 Nev. 257; *State v. Harkin*, 7 Nev. 377; *State v. Johnny*, 29 Nev. 203.)

The indictment contains all of the requirements of sections 7050 and 7058 of the Revised Laws. (*People v. Logan*, 1 Nev. 110; *State v. Anderson*, 3 Nev. 254; *State v. Harris*, 12 Nev. 414; *State v. Carrick*, 16 Nev. 120; *State v. Angelo*, 18 Nev. 425; *State v. Clark*, 32 Nev. 145.)

Matters of evidence need not be pleaded. (*State v. Collyer*, 17 Nev. 275.) Indictments should be interpreted liberally. (*State v. Lovelace*, 29 Nev. 43.) "Feloniously" means "done with intent to commit a crime." (*State v. Clark*, 22 Nev. 145.) The word "feloniously" sufficiently alleges knowledge. (*State v. Barker*, 43 Wash. 69.)

It is not necessary to allege that appellant had any knowledge of the character of the woman with whom he is charged with living. (*State v. Zenner*, 35 Wash. 249.)

"Wilfully" means not only "knowingly," but also means "voluntarily and with a bad purpose"; "intentionally as distinguished from accidental or involuntary"; "is sufficient to allege criminal intent"; "deliberately"; "doing a thing by design." It also signifies "evil intent" or "malice." (8 Words & Phrases, pp. 746, *et seq.*, and cases cited.)

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Per Curiam:

By Revised Laws, section 6445, it is provided: "Every person who * * * 5. Shall live with * * * a common prostitute * * * shall be punished," etc.

Appellant was indicted by the grand jury of Washoe County for the crime of "felony, to wit, living with a common prostitute"; the charging part of the indictment reading: "That said defendant * * * did then and there, wilfully, unlawfully, and feloniously, live with one Mildred Deneve; the said Mildred Deneve being then and there a common prostitute." A demurrer to the indictment, on the ground that it did not state facts sufficient to constitute a public offense, was overruled, and the defendant tried and convicted.

[1, 2] The insufficiency of the indictment is again urged on this appeal. The indictment is in the language of the statute, and, we think, sufficient. In *State v. Raymond*, 34 Nev. 197, we quoted from 19 Cyc. 1393, the following general rule applicable to all indictments: "It is a general rule that if an indictment is based upon a statute it is sufficient if it follows the wording thereof. The rule, however, is subject to the qualification that, unless the words of the statute of themselves fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offense intended to be punished, an indictment charging the offense in the language of the statute will be insufficient.

* * * An indictment based upon a statute, in order to be sufficient, must set forth all the facts which are by statute made ingredients of the offense."

We think the offense here charged is one in which the statute itself sets forth all the elements necessary to constitute the offense. As said in *U. S. v. Cruikshank*, 92 U. S. 542, 23 L. Ed. 588: "Where the definition of an offense * * * includes generic terms, it is not sufficient that the indictment shall charge the offense in the same generic terms as in the definition; it must descend to particulars." For example, the statutory offense of obtaining money or property upon "false pretenses" would

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not be sufficiently charged in the language of the statute; for "false pretenses" is a generic term, which includes an innumerable variety of acts and conduct. There is nothing of a generic nature about the statutory definition of the crime of "living with a common prostitute."

The numerous cases cited in the briefs of counsel point out the distinction which controls the essential requisites of an indictment for a statutory offense. The recent case of *State v. Topham* (Utah), 123 Pac. 888, is particularly instructive and in point. The Utah court therein reviews many authorities, and points out clearly the distinction which controls in numerous cases.

[3] Certain remarks of the district attorney are assigned as error; but it appears that they were based on testimony in the case, and, we think, cannot be regarded as improper argument.

[4] The record contains a number of assignments of error which have not been referred to in the briefs or argument, and, we think, do not require consideration.

The judgment is affirmed.

Points decided

[No. 1945]

**INDIANA NEVADA MINING COMPANY, RESPOND-
ENT, v. GOLD HILLS MINING AND MILLING
COMPANY, APPELLANT.****1. APPEAL AND ERROR—FINDINGS—CONFLICTING EVIDENCE.**

A finding on conflicting evidence is conclusive on appeal.

2. MINES AND MINERALS—PATENTS—PRIORITIES.

Where prior to the patent survey of a second mining claim and the moving of its line, the end of the line of the original claim was, on the making of the patent survey for that claim, moved so as to correspond with the call in the location notice and certificate, the owners of that claim have priority.

3. MINES AND MINERALS—LOCATIONS—FILING OF CERTIFICATE.

Failure to properly file a certificate or amended certificate of location does not affect the rights thereunder, but merely changes the burden of proof.

4. MINES AND MINERALS—CLAIM EXTINGUISHED, WHEN.

The patenting of a mining claim containing within its surface boundaries, as patented, the location monument and shaft of another claim extinguishes the latter.

5. MINES AND MINERALS—ATTEMPTED AMENDMENT OR RELOCATION OF EXTINGUISHED CLAIM, EFFECT.

Vacant ground, formerly a portion of a location which has been extinguished by having its location monument and shaft included within the exterior boundaries of a patented claim, may not be held as an amended location of the original extinguished claim, but such an amended location or relocation of the original claim will be regarded as a new and independent location, and no rights can attach thereto by virtue of the extinguished location.

6. MINES AND MINERALS—LOCATION—ABANDONMENT.

Abandonment of a location is largely, if not entirely, a question of intent.

7. MINES AND MINERALS—LOCATION—FORFEITURE.

Forfeitures are not favored by the law, and are held to exist only when the facts clearly justify, so that the forfeiture of a mining location will not be declared merely because of the removal of the location monument where there was no intention to abandon.

APPEAL from the Fifth Judicial District Court, Nye County; *M. R. Averill*, Judge.

Suit by the Indiana Nevada Mining Company against the Gold Hills Mining and Milling Company. From a judgment for plaintiff, defendant appeals. **Affirmed.**

The facts sufficiently appear in the opinion.

Argument for Appellant

John R. Smith and S. L. Carpenter, for Appellant:

The Indiana No. 1 was a valid location taking in all the ground to the true end of the Conservative, and including the disputed area. The location notice of the Indiana No. 1 properly called for 300 feet on each side of the middle of the vein. The law as it stood at that time gave to the locators ninety days within which to mark their boundaries and definitely establish the lines of their claim. They had made their discovery upon a vein plainly discernible upon the surface, and having an average obvious width of at least 100 feet between walls, and so long as they did not interfere with or prejudice the rights of others, they had a right in monumenting and defining their claim to take for that claim the full width of 600 feet allowed by law, taking it, however, at their peril should it be found that the course of the vein departed from a straight line through the claim and left an excess location by reason of a portion of the claim being more than 300 feet from the middle of the ledge at the surface. Subject only to these exceptions these locators had a perfect right as against all the world to claim a piece of ground 1,500 feet long by 600 feet wide, and taking in the vein or ledge which they had discovered. At all the times when each and every of these things were done by the Indiana No. 1 locators, the south end-line of the Conservative was definitely established and marked upon the ground at and along the line found by the court and marked upon the plat as A, B, C projected across the claim. All the rights that the Conservative had or could have ended at that line, and this record will be searched in vain for any lawful act or thing at any time done or performed, or any location made having the effect of extending the area of the Conservative lode claim beyond that line and over the disputed area in this case.

The court below rested its rulings upon the findings of fact made by it to the effect that there was a strip on the east side of the Indiana No. 1 which was an excess location, expressly upon the case of *Taylor v. Parenteau*, 23 Colo. 368. We contend that *Taylor v. Parenteau* is not

Argument for Appellant

at all applicable to the facts found in this case, because it was a decision which rests upon the expressed terms of a statute entirely different from the laws of Nevada. The federal statute clearly fixes a maximum surface area, which no claim shall exceed, and also a minimum width, but as to the width it has been the uniform holdings of the courts that the width is subject to the action of the states or the proper mining regulations of miners where such regulations are enforced or authorized. (Snyder on Mines, sec. 115; Stats. 1897, pp. 103-109.)

This statute was absolutely complied with, and the court has so found, by the locators of the Indiana No. 1, and it was a matter of indifference so far as the width of the claim was concerned at which point on the claim their discovery shaft was situated, so long as it was a discovery upon the vein. In Colorado the location of the discovery shaft was given a vital bearing on the width of the claim; in Nevada it was not; and this essential difference takes away from the authority relied on by the court its entire force and effect within this jurisdiction. Besides that, this court by a long series of decisions has adhered to the more liberal rule of ascertaining, declaring and marking the boundaries and surface rights of mining claims than this decision would allow. (*Golden Fleece v. Cable*, 12 Nev. 329; *Phillpotts v. Blasdel*, 8 Nev. 61; *Nash v. McNamara*, 30 Nev. 114; *Erwin v. Perego*, 93 Fed. 608.)

The overlapping of the Indiana No. 3 in no way concerned the Conservative, nor would any shifting of the lines, even had it occurred, concern them, because the two Indianas were owned by the same parties, and as among themselves they had a right to adjust or change their lines. (*Tonopah v. Tonopah*, 125 Fed. 389, 400, 408.)

The court erred in basing rights upon an excluded certificate. (*Ford v. Campbell*, 29 Nev. 578.)

No question is made as to the validity of the Indiana No. 2 location, the only finding being that its rights are junior to those of the Conservative as defined by its survey for amended certificate. The Conservative had

Argument for Respondent

set its stakes so as to take in this ground before it was relocated, but it had not done one thing necessary to make it part of that claim—filed with the district recorder an amended location certificate—nor has it done so to this day.

The court gives the ground to the Conservative by virtue only of its arbitrary extension of its lines and resetting of its monuments, done, and found to be done, without compliance with an essential requirement of the law.

Thomas, Bryant, Nye & Malburn and Bartlett & Thatcher, for Respondent:

The right of a locator to change his boundaries and take in additional ground, if he so desires, is fixed beyond controversy, and this irrespective of whether or not he files an amended location certificate. (*Duncan v. Fulton*, 61 Pac. 244; *Bunker Hill Co. v. Empire Co.*, 134 Fed. 268; *Brown v. Oregon Co.*, 110 Fed. 728; *Hall v. Arnott*, 22 Pac. 200; *Jordan v. Schuerman*, 53 Pac. 579; *Deeney v. Mineral Co.*, 67 Pac. 724; *Morrison v. Regan*, 67 Pac. 956; *Butte Co. v. Barker*, 89 Pac. 302.)

There being no necessity for filing a location certificate in this state, the boundaries of the Conservative as against all subsequent rights were fixed at least in January, 1907.

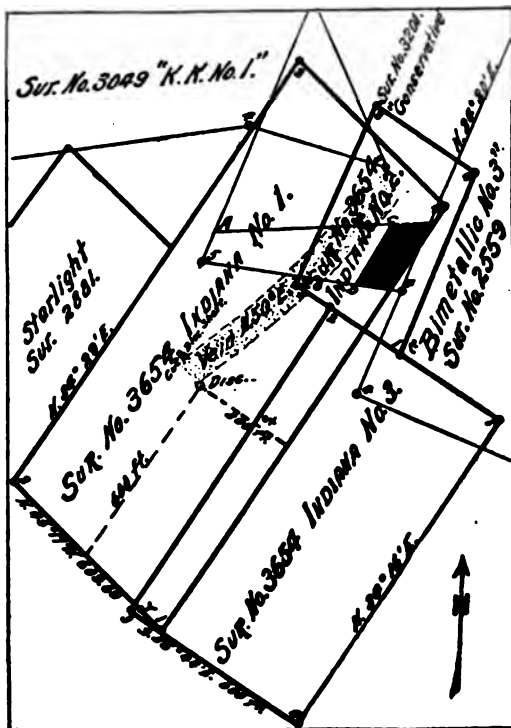
Looking at the Indiana No. 2 we find that this claim was located originally, so it is claimed, in February, 1905. At that time it was immediately north of the Indiana No. 3, and covering substantially the same ground as the Bimetallic No. 3, and the court will note from the map that this did not conflict with the Conservative. This is as near as we can get at the so-called original location of the Indiana No. 2. No one pretended to give its boundaries with any degree of accuracy. The Bimetallic claim ceased to exist long prior to the survey, for No. 3 went to patent in 1906 and took in the discovery shaft, the location monument, and substantially all of the ground of the original Indiana No. 2. There can be no rights of any

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description claimed of the Indiana No. 2, except from the date of November 28, 1908, nearly two years subsequent to the placing of the final stakes upon the Conservative.

By the Court, NORCROSS, J.:

This is a suit brought under the provisions of section 2326, U. S. Revised Statutes (U. S. Comp. St. 1901, p. 1430; Rev. Laws, 2384), upon an adverse claim and protest filed in the United States Land Office at Carson City,



Nevada, against the application of the respondent for a patent to the three mining claims named "Indiana No. 1," "Indiana No. 2," and "Indiana No. 3," embraced in survey No. 3,654. Respondent, as plaintiff in the court below, alleged ownership of the "Conservative claim," embraced in survey No. 3,201, and that the same was located prior

to any of the said Indiana claims, and that respondent is entitled to the area in conflict between the said "Indiana" claims and the said "Conservative" claim. An answer was filed putting in issue the material allegations of the complaint. A diagram accompanying appellant's brief is inserted (p. 162) showing substantially the area in controversy, only that portion of which shown in black is now questioned on this appeal by appellant.

The court below found the facts of the case as follows:

"First—That the Conservative lode mining claim was duly located under the laws of the State of Nevada and the United States on the 23d day of January, A. D. 1905, and since that time has been maintained as a valid location under said laws.

"Second—That the Indiana No. 1 lode mining claim was duly located under the laws of the State of Nevada and the United States on or about the 17th day of February, A. D. 1905, and has been maintained as a mining location from that time to the present.

"Third—That, as originally located, the Indiana No. 1 lode mining claim lay about 100 feet west of its present position as shown by its patent survey.

"Fourth—That, before the boundaries of the Indiana No. 1 were defined by stone monuments, the south boundary of the Conservative lode mining claim had been defined by two stone monuments, one at its southwest corner about 79 feet north of its present southwest patent post, and the other at a point south $17^{\circ} 41'$ west 151 feet slope measurement from post No. 3, survey 3,049, K. K. No. 1 lode.

"Fifth—That, before the boundaries of the Indiana No. 1 were defined as shown by its patent survey, the boundaries of the Conservative had been defined by posts set very nearly in the positions the posts of its patent survey now occupy.

"Sixth—That the Indiana No. 2 claim in its present status is junior to the Conservative claim as defined by its survey for amended certificate."

It is the contention of appellant that the portion of

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ground in question should have been determined to be a part of the Indiana No. 1, and that if not found to be within the exterior boundaries of that claim, as originally located, it was then a portion of the No. 2 location.

[1] The only finding questioned by the appellant is the third quoted, *supra*. This finding was based on conflicting evidence, and under the well-established rule is conclusive on this court. It would seem that the court below held as a matter of law, and it is so contended by counsel for respondent in this appeal, that the location monument as originally placed and maintained, until moved a hundred feet, more or less, to the east at the time of the patent survey, fixed the center of the lode or vein for the purposes of the location; that the lode line must be deemed to pass through the point covered by that monument, and that the side lines of the claim may not be placed more than 300 feet therefrom. This very interesting question of law we need not consider, for the court found as a fact that the claim, as originally marked on the ground, had its easterly side line substantially 300 feet easterly of a line passing through the discovery monument as established at the date of the location.

[2] As the patent survey of the Conservative was made in January, 1907, and the south end line of the claim was moved to the south of the line originally monumented to correspond with the call in the location notice and certificate prior to the patent survey of the Indiana No. 1, and the moving of the easterly side line of that claim to the east, it follows that the owners of the Conservative claim have a better right than the owners of the Indiana No. 1 to the ground in conflict occasioned by such changes in the boundaries of the respective claims.

[3] Counsel for appellant contend that the court below based the rights of the respondent to the area in question upon an excluded amended certificate of location of the Conservative claim filed with the county recorder, but not with the district recorder after the patent survey. Failure to properly file a certificate or amended certificate of location only shifts the burden of proof, and in this case there

was proof, independent of the excluded certificate, upon which the court undoubtedly relied, showing the changes made in the southerly end line of the Conservative. (*Ford v. Campbell*, 29 Nev. 578, 92 Pac. 206.)

[4] Appellant's contentions based on the Indiana No. 2 location are also, we think, without merit. When the Indiana group of claims was located on February 17, 1905, the No. 2 claim was located immediately to the north of No. 3, and covering in the main the Bimetallic No. 3 claim, shown on the diagram. During the year 1906 the owners of the Bimetallic No. 3 received a patent for the latter claim, which claim as patented contained within its surface boundaries the location monument and shaft of the Indiana No. 2. The effect of this was to extinguish the Indiana No. 2 as a valid location.

[5] At the time of the patent survey of the Indiana claims, November 28, 1908, a small fraction of vacant ground was found to the north of the Indiana No. 3 and to the west of the Bimetallic. This was located by the owners of the Indiana claims. It was called a relocation of the Indiana No. 2, and an amended certificate of the certificate of the original location filed. We think the Indiana No. 2 claim must be regarded as a new and independent location, and that no rights can attach thereto by virtue of the extinguished location of the claim of the same name. As it is subsequent in time to the patent survey of the Conservative claim, the owners of the latter claim have a superior right to the ground in question as against any rights based on the Indiana No. 2 location.

[6, 7] This disposes of the question raised by the appellant on this appeal. Counsel for the respondent have assigned "cross-errors," and contend that we should sustain their contention that the locations of both the "Indiana No. 1" and the "Indiana No. 2" locations are void. If we concede, without so deciding, that respondent is entitled to raise these questions, nevertheless, under the view we have taken of the No. 2 location, its validity is immaterial to respondent. The alleged invalidity of the No. 1 location is based upon the contention that

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the removal of the location monument of the claim at the time of the patent survey was in effect a forfeiture or abandonment of the claim, as it left the claim without a valid location monument. This contention is clearly without merit. Abandonment is largely, if not entirely, a question of intent, and here the intent was manifestly to the contrary. Forfeitures are not favored in the law, and are only held to exist when facts clearly justify. No facts warranting the holding of a forfeiture of the "Indiana No. 1" claim appear in this case.

The judgment and order appealed from are affirmed.

[No. 2040]

**ADAMS F. BROWN, IN THE MATTER OF THE PRIMARY
ELECTION OF JUSTICE OF THE PEACE, RESPONDENT,
v. JOHN H. DUNN, APPELLANT.**

1. ELECTIONS—PRIMARY ELECTION—BALLOTS—RECOUNT—STATUTES.

Rev. Laws, 1513, provides that the board of county commissioners shall act as a board of canvassers, and declare the general election returns, and that, when it shall appear from such canvass that any legislator, county or township officer voted for at such election has received a majority of ten votes or less, in such case, on the application of the defeated candidate, setting forth under oath that he has reason to believe that a mistake or mistakes have occurred on the part of the inspectors of the election in any election precinct or precincts, sufficient to change the result so far as the particular office is concerned, it shall be the duty of the board of county commissioners to immediately recount the ballots. This section was made applicable to primary elections by the primary election law of 1911, c. 167, sec. 14, amending Stats. 1909, c. 198, sec. 31. *Held*, that section 1513 did not authorize a recount before the courts, but left the parties free without a recount by the board to initiate such contests in the courts as might otherwise be prescribed by law.

2. ELECTIONS—PRIMARY ELECTION LAW—CONTEST—AFFIDAVIT.

Rev. Laws, 1763, provides that whenever it shall be made to appear by affidavit to any justice of the supreme court or judge of the district court of the proper county that an error or omission has occurred or is about to occur in the placing of any name on an official primary election ballot, or that any wrongful act has been or is about to be done by any officer or board charged with any duty concerning a primary election, etc., such justice or judge shall order the officer or person charged with

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the error to desist from the wrongful act or perform the duty or forthwith show cause why he should not do so. Section 1764 declares that any candidate at a primary election desiring to contest the nomination of another candidate for the same office may proceed by affidavit within five days after the completion of the canvass and the contestees shall be required to appear and abide the further order of the court. *Held*, that where a contestant for the nomination for justice of the peace in a township claimed that he was deprived of the nomination by mistakes in counting the ballots in certain precincts, he was entitled to initiate a contest by affidavit before the district court under such sections, regardless of his right to a recount by the board of county commissioners as is provided for by section 1513.

3. ELECTIONS—CONTEST—PRIMARY ELECTIONS—PROCEDURE.

Rev. Laws, 1764, providing that any candidate at a primary election desiring to contest the nomination of another candidate for the same office may proceed by affidavit, etc., was a special law relating to primary election contests, which control as to them, the provisions of the civil practice act requiring that there shall be but one form of action and for the requisites of a complaint therein.

4. ELECTIONS—PRIMARY ELECTION—CONTEST—OFFICIAL RETURNS.

Where a primary election contestant attacks the returns in more precincts than can be recounted within the period limited under the primary law, the original returns will stand under the presumption that they are correct, in precincts where the ballots are not recounted.

5. ELECTIONS — PRIMARY ELECTION — CONTEST — AFFIDAVIT — FORM — NAMES OF PARTIES.

An affidavit initiating a primary election contest was not fatally defective because it did not name the parties to the contest in a title or heading, where the body of the affidavit clearly showed who were the parties in interest.

6. ELECTIONS—PRIMARY ELECTION—CONTEST.

An affidavit initiating a primary election contest alleging that the petitioner had reason to believe, and did believe, that mistakes had occurred in counting ballots in specified precincts sufficient to change the result of the election, was sufficient to secure a recount before a judge of the district court.

7. ELECTIONS—PRIMARY ELECTION—CONTEST—PETITION—PRAYER.

An affidavit for a primary election contest before a judge of a district court, praying that all the ballots cast in the precincts objected to for the particular office might be recounted, and for such further relief as the court might seem meet and proper, was sufficient.

APPEAL from the Seventh Judicial District Court, Esmeralda County; *Mark R. Averill*, Judge presiding.

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Primary election contest by Adams F. Brown against John H. Dunn and another, to determine the nomination for the office of justice of the peace of Goldfield township. Judgment for contestant, and defendant Dunn appeals. **Affirmed.**

The facts sufficiently appear in the opinion.

P. F. Carney and J. F. Kunz, for Appellant:

No parties plaintiff or defendant are designated and the petition should have been dismissed. (*Mexican Mill v. Yellow Jacket M. Co.*, 4 Nev. 40; *Whitney v. Blackburn*, 21 Pac. 876; *Little v. Water Co.*, 9 Nev. 318; 31 Cyc. 631.)

A general averment of election mistakes or frauds is insufficient. The facts relied on must be alleged. (*Todd v. Stewart*, 23 Pac. 426; *Robertson v. Board*, 79 Pac. 97; *Homer v. Howell*, 86 Pac. 1077; *Shorts v. County*, 23 Pac. 84; *Clanton v. Ruan*, 24 Pac. 255; *Gillespie v. Dion*, 44 Pac. 958; *Balterton v. Fuller*, 60 N. W. 1071; *Oxley v. Allen*, 107 S. W. 944; *Ham v. Buck*, 47 S. 126; *Lowry v. Cheatham*, 62 S. E. 226; *Leonard v. Woolford*, 46 Atl. 1026; *Edwards v. Logan*, 70 S. W. 852; 15 Cyc. 405.)

Where an election is held by duly appointed officers, the presumption is that votes cast and counted are legal. (*Harris v. Palmer*, 108 Pac. 385.)

If the contestant was entitled to any relief, his remedy was by *mandamus* to compel the county commissioners to perform the duty which he requested of them. (*Metz v. Maddox*, 82 N. E. 507; Rev. Laws, 1513.)

Thompson, Morehouse & Thompson, for Respondent.

Per Curiam:

At the primary election held September 3 in Goldfield township, as candidates for the Democratic nomination for justice of the peace, Marvin Arnold received 278 votes, Adams F. Brown 287 votes, and John H. Dunn 288 votes, according to the canvass of returns made by the board of county commissioners on September 7. Thereupon Adams F. Brown gave notice in writing to the

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board that he would demand a recount of the ballots cast at the primary election on the following Monday, which would be within five days after the making of this canvass, and the board of county commissioners then and there made and entered an order to the effect that they thereby refused, and would refuse, to grant a recount of the ballots cast at the primary election. On September 9 Adams F. Brown filed in court the following document:

"In the District Court of the Seventh Judicial District, State of Nevada, in and for the County of Esmeralda. In the Matter of the Office of Justice of the Peace of Goldfield Township, Votes at Primary Election—Petition and Affidavit. Respectfully represents your petitioner, Adams F. Brown, that he is, and has been for several years last past, a duly qualified elector of the Second precinct, residing at 314 East Crook Avenue in the township of Goldfield in the county of Esmeralda and State of Nevada; that a primary election was held on Tuesday the third day of September, A. D. 1912, and at said election candidates were voted for in said Goldfield to be nominees of the various political parties, to be voted for at the next general election for the office of justice of the peace of said Goldfield township, and that your petitioner was one of the candidates so voted for; that on the seventh day of September the county commissioners made a canvass of the returns and announced that on the Democratic ticket for said office Marvin Arnold had received 278 votes, Adams F. Brown 287 votes, and John H. Dunn 288 votes, whereupon your petitioner gave formal notice of a request for a recount, which request the county commissioners upon the advice of John F. Kunz, deputy district attorney, refused to grant; that your petitioner has reason to believe and does believe that a mistake or mistakes have occurred on the part of the inspectors of election in precincts 1, 2, 3, 4, 5, 6 and 7, in said Goldfield sufficient to change the result of said election so far as said office is concerned. He therefore respectfully prays that all the ballots cast in said precincts for said office may be recounted and for such

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further relief as to the court may seem meet and proper. Dated this ninth day of September, A. D. 1912. Adams F. Brown, Petitioner."

John H. Dunn moved to dismiss, moved to quash, and demurred to the petition and affidavit, on the grounds that there is a defect in the parties plaintiff and defendant; that no parties plaintiff or defendant are designated in the caption of the petition and affidavit; that the facts alleged in the petition and affidavit are insufficient to give the court jurisdiction or to warrant the making of an order granting any relief thereon; that the validity, accuracy and truth of the canvass of the returns or declaration of the election cannot be put at issue by vague, general, and indefinite charges such as those made in the petition; that the petition and affidavit shows upon its face that the contestee, John H. Dunn, received a plurality of all the votes cast; that the court is without jurisdiction to correct any mistakes of the count upon the facts alleged in the petition; and that the prayer of the petition and affidavit prays for no relief. The motions and demurrer were overruled.

An answer was filed, alleging, among other things, that on the 7th day of September, 1912, there was issued to John H. Dunn, by the board of county commissioners, sitting as a board of canvassers of the votes at the primary election, a certificate of nomination on the Democratic ticket for the office of justice of the peace of Goldfield township, which was filed with the county clerk; admitting that Adams F. Brown filed a notice of intention to make a demand or application for a recount before the board of county commissioners of all the ballots voted in the primary election; denying that Adams F. Brown made any application to the board of county commissioners, sitting as a board of canvassers, setting forth under oath that he was a defeated candidate for such office, or that he had reason to believe, or did believe, that a mistake or mistakes had occurred on the part of the inspector or inspectors of election in any precinct or precincts sufficient to change the result of the election, or that any

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demand sufficient in law was made upon the board of canvassers; denying that the petitioner, Adams F. Brown, has reason to believe, or does believe, that mistakes have occurred on the part of the inspectors of election sufficient to change the result, and alleging that the contestee has reason to believe, and does believe, that no mistakes have occurred on the part of the inspectors of any of said precincts sufficient to change the result of the election.

The answer also states: "And for further answer, contestee, John H. Dunn, states that that part of section 1513 of the Revised Laws of the State of Nevada which purports to give the right of a recount of the ballots to a candidate having less than ten votes than his opponent is unconstitutional for the reason that said subject-matter relative to getting a right of contest is not germane to the subject-matter interposed, and the title of the act being as follows: 'An act to create a board of county commissioners, in the several counties of this state, and to define their duties and powers.' And he further states that this proceeding is an attempt to substitute the district court to perform and for the performance of a ministerial duty by statute given to the county commissioners, sitting as a board of canvassers of election returns, all of which is contrary to law."

It was stipulated in open court by all the parties in interest that Marvin Arnold should be permitted to participate in the contest, and should be considered as having filed the same papers and made the same objections, motions, and exceptions as John H. Dunn. The court recounted the ballots, and found that of the legal votes cast for the nomination for candidates on the Democratic ticket for justice of the peace of Goldfield township Adams F. Brown received 270, Marvin Arnold 268, and John H. Dunn 267. After finding that Adams F. Brown was the duly elected and qualified Democratic candidate for justice of the peace in and for Goldfield township, to be voted for at the election to be held November 5, 1912, the court made its order and judgment accordingly, and decreed that the certificate of election issued to John

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H. Dunn by the board of county commissioners was void, and that he be restrained from using it for any purpose, and commanded the county clerk to issue to Adams F. Brown, as the Democratic nominee, a certificate of nomination for the office of justice of the peace for Goldfield township, and that the clerk file the same in his office and cause the name of Adams F. Brown to appear upon the official ballot for the general election as such candidate, and to keep the name of John H. Dunn off the official ballot.

It is urged that the motion of the contestee, John H. Dunn, to dismiss the petition upon the ground that no parties plaintiff or defendant were designated, and that no demand was made for relief in the prayer of the petition and affidavit, ought to prevail; that the allegation regarding the making of mistakes in the counting of the ballots is insufficient, and that no facts are stated warranting the granting of relief; that the petition and affidavit does not allege that a demand under oath as required by section 1513, Revised Laws, was made for a recount; that, where an election is held by the duly elected officers, the presumption is that the votes cast and counted are legal; that the certificate of nomination received by John H. Dunn in the course of proceedings, as provided by statute, is presumed to be regular in every respect; that, if the contestant was entitled to any relief by reason of the refusal of the board of county commissioners to recount the ballots, his remedy was by *mandamus* to compel them to perform the duty, and that the court is not authorized to perform the acts of a board of canvassers.

Section 1513, Revised Laws, passed in 1865 and amended in 1877 and 1879, long before the enactment of our primary election law, which was passed in 1909, provides that the board of county commissioners shall act as a board of canvassers and declare the general election returns, and that when "it shall appear from such canvass that any legislator, county or township officer voted for at

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such election has received a majority of ten votes or less, in such case, upon the application of the defeated candidate, setting forth under oath that he has reason to believe and does believe that a mistake or mistakes have occurred on the part of the inspectors of election in any election precinct or precincts, sufficient to change the result so far as the office is concerned, it shall be the duty of the board of county commissioners to immediately proceed to recount the ballots," and declare the result and issue a certificate of election to the party entitled; "*and provided further*, that nothing herein contained shall prevent either party to said proceeding to contest the right to said office in the courts in the manner now prescribed by law."

[1] If this provision for a recount of the ballots in cases where there is a majority of ten or less is not exclusive, or if any section of the law authorizes a recount or review by the court, it is not necessary to determine whether under section 1765 of the Revised Laws, which is section 31 of the recent primary law (Stats. 1909, c. 198) as amended in 1911 (Stats. 1911, c. 167), and which states that all provisions of the law governing elections, except as otherwise provided, shall apply in equal force to primary elections, authorizes a recount by the board of county commissioners. As they did not recount, and this is not a proceeding to compel them to recount, the question as to whether they would be required to recount the ballots in a primary election when a candidate received a majority of ten or less, as they are authorized to do in regard to a general election, is not directly involved in this case. The legislature has made a liberal rule in regard to the allegations of the affidavit for a recount under section 1513, by directing that the contestant may state that he has reason to believe, and does believe, that mistakes have occurred which would change the result. But that section does not attempt to authorize a recount before the courts, but leaves the parties free to initiate such contests in the courts as may be otherwise prescribed by law.

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[2] It is provided in the primary election law (Rev. Laws, 1763) that "whenever it shall be made to appear by affidavit to any justice of the supreme court, or judge of the district court of the proper county, that an error or omission has occurred or is about to occur in the placing of any name on an official primary election ballot, * * * or that any wrongful act has been or is about to be done by any judge or clerk of a primary election, county clerk, registrar of voters, canvassing board or other person charged with any duty concerning the primary election, or that any neglect of duty has occurred or is about to occur, such justice of the supreme court or judge of the district court shall order such officer or person charged with such error, wrong or neglect to forthwith correct the same, desist from the wrongful act or perform the duty, or forthwith show cause why he should not do so." Section 1764 provides: "Any candidate at a primary election desiring to contest the nomination of another candidate for the same office may proceed by affidavit within five days after the completion of the canvass as provided in section 23 of this act. And the contestee shall be required by the order of such justice of the supreme court or judge of the district court to appear and abide the further order of the court." Under these sections the contestant was authorized to initiate a contest by affidavit before the district court, regardless of whether he was entitled to a recount by the board of county commissioners.

[3] The contention that the sections of the civil practice act providing for one form of action and for the requisites of a complaint control this proceeding, if allowed, would tend to eliminate this clear provision enacted by the legislature for a contest by affidavit. As the rule is well settled that, as to the matter to which it relates a special law controls a general one, these provisions of the primary election act for initiating contests by affidavit, being special, are in force, and cannot be ignored by the court, and are not controlled or eliminated by general provisions of the civil practice act providing

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for a formal action and the necessary requirements relating to parties and the allegations of the complaint. As the time is short in which a contest may be conducted and errors corrected relating to a primary election, it is apparent that the legislature believed that necessity or good reason existed for providing a summary and speedy proceeding by affidavit. As a ground for holding that no recount of the ballots cast at a primary election should be allowed, it is said that in some cases, such as ones where error is claimed in the various precincts of the state, there would not be time to recount all the ballots and determine the contest.

[4] If the contestant attacked the returns in more precincts than could be recounted within the period available under the primary law, the original returns would stand under the presumption that they were correct in precincts where the ballots were not recounted.

[5] Although more properly the names of the parties to the contest might have been inserted in the title of the petition and affidavit, we do not think this was a fatal omission, for the body of the affidavit shows clearly who the parties in interest are, and that under section 1764 the petitioner, Adams F. Brown, was entitled to bring the contest against the other candidates for the same office named in the petition and affidavit.

For two reasons the case of *The Proprietors of the Mexican Mill v. Yellow Jacket Silver Mining Co.*, 4 Nev. 40, 97 Am. Dec. 510, upon which contestee relies, is distinguishable. In that case the action had to be brought by complaint, and there was no provision for allowing a proceeding to be initiated by affidavit, and the names of the parties in interest could not be discerned either from the title or the body of the complaint, while here they are shown in the affidavit.

[6] The allegation that the petitioner has reason to believe, and does believe, that mistakes have occurred sufficient to change the result of the election, is somewhat in the nature of an allegation upon information and belief in a complaint; and, as the legislature has provided

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in section 1513 that such an allegation is sufficient to secure a recount before the board of county commissioners of the ballots cast at a general election, and has provided a summary proceeding for a primary election contest, we conclude that such an allegation is sufficient for the securing of a recount before a judge or court of the ballots cast at a primary election. It may be difficult for the contestant to state in detail the particular ballots or the number which he is informed or believes have not been properly counted.

[7] In such a summary proceeding, we consider sufficient the prayer of the petition for the recount of the ballots, and for such further relief as to the court may seem meet and proper. The same formality is not required as in a complaint in an ordinary action under the provisions of the civil practice act.

Section 5476, Revised Laws, provides: "An affidavit, notice, or other paper, without the title of the action or proceeding in which it is made, or with a defective title, shall be as valid and effectual for any purpose as if duly entitled, if it intelligibly refer to such action or proceeding."

In *State v. Mining Co.*, 13 Nev. 195, affidavits filed for the purpose of setting aside the default in an action which was simply entitled, "State of Nevada, Storey County," it was held that, as they intelligibly referred to the action, the fact that they were not properly entitled was immaterial. Section 5066, Revised Laws, provides: "The court shall, in every stage of an action, disregard any error or defect in the pleadings or proceedings, which shall not affect the substantial rights of the parties; and no judgment shall be reversed or affected by reason of such error or defect."

In *Sweeney v. Schultes*, 19 Nev. 58, it was held that the general tendency of the decisions is to look with disfavor upon mere technical objections which relate solely to the form of the proceedings, and where it is apparent that the error is one which has caused no substantial injury to the party complaining.

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In *Prezeau v. Spooner*, 22 Nev. 88, it was held that, where no substantial right can be affected by an error occurring in the lower court, both law and common sense require that such error be disregarded. This court has followed the same liberal rule in criminal cases under sections 7302 and 7469, and in decisions cited under those sections.

The contestee has referred us to cases holding to a strict rule regarding allegations, and that no action will lie to contest a nomination shown by the canvass of the primary election; but these decisions are from states without statutory provisions like ours providing for such contests. On the other hand, contestant has cited cases favoring a liberal rule in regard to allegations and contests, which we think are more in accord with our statute.

No error is claimed as to recount of ballots, or that the nomination as ordered is not in accordance with the will of a majority of the voters.

The order and judgment of the district court are affirmed.

Argument for Appellants

[No. 2004]

**GOLDFIELD CONSOLIDATED MINES COMPANY,
RESPONDENT, v. THE STATE OF NEVADA AND
THE COUNTY OF ESMERALDA, APPELLANT.****1. CONSTITUTIONAL LAW—TAXATION—PATENTED MINING CLAIMS—
ASSESSMENT—NET PRODUCTS.**

Article 10 of the constitution, as amended and ratified at the general election in 1906, provides (section 1) that the legislature shall provide for uniform and equal taxation and for a just valuation for taxation of all property, except mines and mining claims, when not patented, the proceeds alone of which shall be assessed and taxed; and, when patented, each patented mine shall be assessed at not less than \$500, except when \$100 in labor has been actually performed thereon during the year, in addition to the tax on the net proceeds, etc. Rev. Laws, 3621, provides that all property within the state shall be subject to taxation, except: "Second—Unpatented mines and mining claims; *provided*," etc. *Held*, that where \$100 worth or more of labor has been expended on a patented mining claim during any one year and prior to the time of assessment, the mine is exempt from taxation, except on the proceeds thereof.

2. CONSTITUTIONAL LAW—CONSTRUCTION.

In the construing of constitutions or statutes the intention of the convention or the legislature controls, to be determined in accordance with established rules.

3. TAXATION—EQUALITY.

A basic principle of all property taxation is that it shall be uniform and equal regardless of the method adopted to arrive at the result.

APPEAL from the Seventh Judicial District Court, Esmeralda County; *Peter J. Somers*, Judge.

Action by the Goldfield Consolidated Company against the State of Nevada and Esmeralda County to review the assessment of certain mining claims for taxation. From a judgment for plaintiff, defendants appeal. **Affirmed.**

The facts sufficiently appear in the opinion:

Cleveland H. Baker, Attorney-General, and *J. Emmitt Walsh*, District Attorney of Esmeralda County, for Appellants:

In other states, where similar provisions prevail and similar exemptions exist, the courts have held that such

Argument for Respondent

exemptions do not exist in favor of patented mining claims, but only in favor of unpatented mining claims. (*Waller v. Hughes*, 11 Pac. 122; *Salisbury v. Lane*, 63 Pac. 383.)

The plain language of the constitutional provision is decisive in showing that patented mining claims should be taxed, for, unless the legislative enactment, which was passed in 1909 to carry out the constitutional provision, specifically exempted patented mining claims from taxation, they do not come within the exemption when the statute states what property shall be exempt, and it is apparent that it never was the intention of the legislature, or the people, in adopting article 10 of the constitution, to exempt patented mining claims from taxation, but, on the contrary, it appears that the proceeds of the mines are subject to a bullion tax in addition to an assessment of not less than five hundred dollars on each patented claim, and therefore the assessment levied in this action should be held valid.

Henry M. Hoyt, for Respondent:

We maintain that the only change intended to be effected by this amendment was to cure a certain existing mischief, namely, the evil of allowing patented mining claims to be left unworked and exempt from taxation, resulting in unproductiveness and, in many instances, the impossibility of even finding out who are the owners. The remedy adopted to cure the mischief was to place an assessment and tax upon an unworked patented mining claim, so that if the owner did not care enough about his property to pay the tax, it could be knocked down at public sale to some one who, having thus acquired the title, could put the mining claim to some practical use. This is the historical and well-known basis for the constitutional amendment, and this is what the people of Nevada understood to be the purpose to be accomplished. The legislative intent is very plain. The original constitutional provision (article 10) exempted both patented and unpatented mining claims from all taxes

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except the tax upon proceeds. The new constitutional amendment left unpatented mining claims as they were before, because the legislature and the people realized that the United States statutes require one hundred dollars worth of work annually upon each unpatented claim.

Per Curiam:

This appeal presents the sole question: Is a patented mining claim, on which there has been expended one hundred dollars or more in labor during the year, subject to assessment and taxation in addition to the tax on its net products?

[1] Article 10 of the constitution, as amended by the legislature and ratified by the people at the general election in 1906, reads:

"SECTION 1. The legislature shall provide by law for a uniform and equal rate of assessment and taxation, and shall prescribe such regulations as shall secure a just valuation for taxation of all property, real, personal and possessory, except mines and mining claims, when not patented, the proceeds alone of which shall be assessed and taxed, and when patented, each patented mine shall be assessed at not less than five hundred dollars (\$500) except when one hundred dollars (\$100) in labor has been actually performed on such patented mine during the year, in addition to the tax upon the net proceeds; and also excepting such property as may be exempted by law for municipal, educational, literary, scientific or other charitable purposes."

As originally adopted by the constitutional convention and ratified by the people in 1864, the article read:

"SECTION 1. The legislature shall provide by law for a uniform and equal rate of assessment and taxation and shall prescribe such regulations as shall secure a just valuation for taxation of all property, real, personal, and possessory, excepting mines and mining claims, the proceeds of which alone shall be taxed, and also excepting such property as may be exempted by law for municipal,

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educational, literary, scientific, religious or charitable purposes." (Rev. Laws, 352.)

An amendment to article 10, proposed and passed by the legislatures of 1899 and 1901, inserted the following provision in the body of the original section: "But the acreage of patented mining claims shall also be assessed at a valuation of ten dollars per acre." The vote of the electors at the general election of 1902, in ratifying this amendment, does not appear with certainty to have been officially canvassed, although the book of election returns in the office of the secretary of state appears to show that it received a majority of the votes cast. This amendment, however, is unimportant, save as it may throw some light on the proper construction of the article as it now exists by the amendment approved in 1906.

The legislature of 1909 amended section 5 of the general revenue act (Rev. Laws, 3621) so as to read: "All property of every kind and nature whatsoever, within this state, shall be subject to taxation, except * * * Second—Unpatented mines and mining claims; *provided*," etc.

Prior to the amendment of 1909, *supra*, the exception read: "Second—Mines and mining claims; *provided*," etc.

Was the purpose designed to be accomplished by the amendment of article 10 as it now exists to exempt entirely patented mines and mining claims from assessment and taxation, otherwise than upon the net proceeds, where one hundred dollars or more of labor had been expended upon the same during the year; or was it intended that such expenditure might be taken into consideration in making the assessment, and, when made, permit, but not require, a lower assessment than the minimum otherwise required to be assessed? It is appellants' contention that the letter of the provision supports the latter construction. But when the article is considered as a whole, taken in connection with the general policy of the state since its organization, the reasons which prompted the amendment, and what may be done under the provisions of the section in the event such a construction is held to be the proper one, can it be said that such

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construction is in consonance with the evident intent of the legislature in adopting, and the people in ratifying, the amendment?

This amended section of the constitution first provides for a uniform and equal rate of assessment and taxation of all property, except mines and mining claims, and then provides that the proceeds alone of these, when not patented, shall be assessed and taxed; and the words, "and, when patented, each patented mine shall be assessed at not less than five hundred dollars except when one hundred dollars in labor has been actually performed on such patented mine during the year, in addition to the tax on the net proceeds," we think, mean that patented mines shall be assessed at not less than five hundred dollars, if one hundred dollars in labor has not been actually performed upon such patented mine during the year; but if such labor is so performed upon a patented mine it becomes exempt from assessment and taxation, except on the net proceeds, the same as an unpatented claim.

There is nothing in the language of the amendment specifically directing that patented mines shall be assessed for less than five hundred dollars, or at all, if the one hundred dollars worth of annual labor is performed. Evidently the purpose of the legislature was to stimulate the prospecting of patented mines, and not encourage the owners to have them lie dormant and unprospected, and to require them to pay a tax if they did not do the one hundred dollars worth of annual labor, but to exempt them from this tax if they did perform the labor, as an incentive for performing labor, instead of paying the tax. This construction, we believe, is not only in consonance with the language of the amendment, but it is in accordance with the policy of the state regarding the development of its mineral resources. But conceding, for the purposes of this case, that the literal construction of the section is as contended by appellants, nevertheless such a construction should not be adopted, as it would violate the manifest intent of the legislature in adopting, and the people in ratifying, the amendment.

[2] This court in a number of cases has had occasion to consider the rules which should control in the construction of constitutional provisions.

In *State v. Kruttschnitt*, 4 Nev. 201, Beatty, C. J., delivering the opinion of the court, said: "There can be no doubt but that whenever the interpretation of a statute or a constitution in a certain way will result in manifest injustice courts will always scrutinize the act or constitution closely to see if it will not admit of some other interpretation; for it is not to be supposed that any legislative body passes an act for the purpose of doing a manifest wrong." In *Clarke v. Irwin*, 5 Nev. 121, this court, by Whitman, J., said: "When words are used in a constitution, unless so qualified by accompanying language as to alter their ordinary and usual meaning, they must be received in such meaning."

In *Lewis v. Doron*, 5 Nev. 411, the court quoted with approval from the Court of Appeals of New York the following: "Whether we are considering an agreement between parties, a statute, or a constitution, with a view to its interpretation, the thing we are to seek is the thought which it expresses. To ascertain this, the first resort in all cases is to the natural signification of the words employed, in the order and grammatical arrangement in which the framers of the instrument have placed them. If, thus regarded, the words embody a definite meaning which involves no absurdity, and no contradiction between different parts of the same writing, then that meaning apparent upon the face of the instrument is the one which alone we are at liberty to say was intended to be conveyed. In such a case there is no room for construction. That which the words declare is the meaning of the instrument; and neither courts nor legislatures have the right to add to or take away from that meaning. This is true of every instrument; but when we are speaking of the most solemn and deliberate of all human writings, those which ordain the fundamental law of states, the rule rises to a very high degree of significance. It must be very plain—nay, absolutely certain—

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that the people did not intend what the language they have employed, in its natural signification, imports, before a court will feel itself at liberty to depart from the plain reading of a constitutional provision.' (*Newell v. People*, 3 Seld. 97.)"

In the case of *State v. Dovey*, 19 Nev. 399, Leonard, C. J., delivering the opinion of the court, said: "In construing constitutions and statutes, the first and last duty of courts is to ascertain the intention of the convention and legislature; and in doing this they must be governed by well-settled rules, applicable alike to the construction of constitutions and statutes. 'All laws should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression, or an absurd consequence. It will always, therefore, be presumed that the legislature intended exceptions to its language which would avoid results of this character.' (*U. S. v. Kirby*, 7 Wall. 482, 19 L. Ed. 278.) And see *State v. McKenney*, 18 Nev. 189; *State v. Kruttschnitt*, 4 Nev. 178."

If such a construction of the constitutional provision contended for by the appellants were to be conceded and adopted, then a patented mine could be assessed for its full value, notwithstanding it is also required to pay a tax on its net proceeds. In other words, a patented mine which may justly be valued at a million dollars may be subject to assessment at any figure between one dollar and a million dollars, and the assessment be within the language of the section, regardless of what tax may have been paid on the net proceeds. Under such construction of the language contended for, double taxation, or at least an unequal or unjust burden of taxation, may be imposed on a mine that has a large net product, which consequently gives to the mine itself a high valuation.

Then, also, it is difficult to see how any uniform system of assessing mining property, under this view, could be enforced in the several counties; for the assessing officers of one county might assess the patented mines at their full value, in addition to the tax on the net income, while the revenue officers of another county might fix but a

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nominal valuation on the patented mine. An intention to effectuate such a possibility ought not to be imputed to the legislature, in view of other matters which may properly be considered in arriving at the legislative intent.

At the time of the adoption of the state constitution (1864) the federal mining laws had not been adopted, and patented mines had not come into existence. Mining claims were then held in accordance with the rules and customs of miners, and their possessory rights were recognized by the federal government. The way in which mining property was then held is referred to at some length in the case of *Golden v. Murphy*, 31 Nev. 410.

Under the territorial laws the possessory rights of miners were held to be subject to taxation. (*Hale & Norcross Mining Co. v. Storey County*, 1 Nev. 104.) The constitution for the State of Nevada proposed by the first constitutional convention, which met in 1863, contained a provision for the taxation of mines. This provision was strenuously opposed by the representatives of mining sections, led by Hon. Wm. M. Stewart, whose speech in opposition to the section, as reported by Mark Twain for the *Territorial Enterprise*, first attracted public attention to the literary ability of the latter. Stewart opposed the adoption of the constitution because of this feature, and to the power of his appeal against taxing "the poor miners' shafts and drifts and bedrock tunnels" is credited in part the defeat of the constitution. A reference to the constitutional debates in the convention which proposed the present constitution discloses that the reaching of an agreement as to the method of taxing mines occupied a large portion of the time of the convention, with the result that a provision for taxing the proceeds of mines only was adopted.

By reference to the constitutions and statutes of the western mining states and territories, it will be observed that two general systems of taxation of mines have been in vogue—one the taxing of mines as real property, and the other the taxing of the proceeds of the mines.

Nevada was the first state to adopt the system of taxing the proceeds only. The Colorado constitution provided that for the first ten years following the adoption of the constitution the proceeds of mines only should be taxed; thereafter such property to be taxed as other real property. The constitutions of Montana and Utah are identical in providing that a tax shall be imposed on the proceeds of mines, and, in the case of patented mines, an additional tax per acre at the same amount as the land is sold by the general government. By the constitution of Idaho, mines are taxed as real property. In none of these states can there be found any provisions which would authorize a virtual double taxation on the actual value of mines. The nominal tax of \$5 per acre (the amount charged by the government for the sale of mineral land) does not affect the principle upon which the mines are assessed for revenue purposes. The first proposed amendment to article 10 of the constitution of this state, providing for an assessment of patented mines at \$10 per acre, referred to *supra*, was, in principle, the same as the existing provisions of the Montana and Utah constitutions. A tax based on the acreage of a patented mine at a fixed nominal amount, in the case of a producing mine, is usually inconsiderable when compared with the tax on the proceeds; and it is this latter tax which is regarded as the substantial revenue-producing tax, so far as mines are concerned, in states where this system of taxation is recognized.

[3] A basic principle of all property taxation is that it should be uniform and equal, regardless of the method adopted to arrive at the result. This court, in *City of Virginia v. Chollar-Potosi M. Co.*, 2 Nev. 92, considering the provisions of article 10 of the constitution, by Beatty, J., said: "The leading feature of this section is that the taxation shall be equal and uniform, and that the proceeds of the mines only shall be taxed. In other words, whilst the body of the mine remains untaxed, the ore taken out (for that is the primary proceeds of the mine) shall be subject to the same *ad valorem* taxation as other property."

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We do not think the legislature in proposing, or the people in adopting, the amendment to the section of the constitution under consideration had any intention of changing "the leading feature of this section."

The provision in the exception to the requirement that patented mines be assessed at not less than five hundred dollars, relative to the performance of one hundred dollars in labor during the year, throws light, we think, on what was the legislative intent. In order that an unpatented mining claim may not be subject to forfeiture and the rights of the owner cut off by a subsequent location, the federal laws require that one hundred dollars be annually expended thereon for labor or improvements. As long as this annual expenditure is made, the rights of the owner of an unpatented mine are as secure as though the same were patented. The mine owner may extract and receive the benefit of every pound of ore in the mine and leave the same valueless without ever perfecting a patent to the property. Should the owner fail for a year to do his so-called annual assessment work, another may go upon and relocate the ground and become entitled to the possession thereof, but not so in the case of a patented mine. This leads to the underlying reason for attempting to amend the section. Following the adoption of the federal mining laws, numerous mines were patented in the various mining districts throughout the state. Many of these patented claims were never extensively worked, or, if worked at all at one time, work thereafter ceased. In the lapse of years, owners of these patented claims had in many instances either died or left the state. The claims were apparently abandoned. Not being subject to any assessment, they could not be sold for taxes, and title in another thereby acquired. Not being able to find the owners, persons desiring to work these claims could not obtain title thereto, except possibly through an adverse possession for two years, taking the chance that if a valuable mine were developed in the meantime the owner or some heir or grantee might appear in the last hour and oust the intruder of his

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possession. The state was interested in having these abandoned mines developed; for both by legislative enactment and judicial decree mining was declared to be the paramount industry in the state. A tax upon patented mines was deemed to be a solution of the vexed question.

It is a matter of common knowledge that this is the historical reason for the amendments proposed. While the language used is not the clearest to express the intent, and while the letter of the language may permit of a different construction, one, however, which would make it possible to violate a fundamental principle of taxation—that of uniformity and equality—nevertheless, from all the considerations mentioned, we think the intent of the amendment was to put patented and unpatented mines upon an equality, so far as taxation was concerned, to wit, that when one hundred dollars in labor had been expended upon a patented mine it should, so far as taxes were concerned, be in the same position as an unpatented mine, upon which the same amount was required to be expended to maintain its existence without liability to forfeiture.

It is our conclusion, therefore, that as one hundred dollars in labor had been actually performed on the several patented mines designated in the complaint during the fiscal year and prior to the time of the assessment that the said mines were exempt for the year from the assessment imposed, and the same was void.

The judgment is affirmed.

Argument for Respondent

[No. 2044]

THE STATE OF NEVADA, EX REL. J. F. MILLER,
RELATOR, v. HARLEY A. HARMON, COUNTY
CLERK OF THE COUNTY OF CLARK, STATE OF
NEVADA, RESPONDENT.

1. ELECTIONS — NOMINATION BY CERTIFICATE — QUALIFICATIONS OF
SIGNERS.

Under the act of March 13, 1891 (Stats. 1891, p. 40, sec. 4; Rev. Laws, 1836), which provides for nomination of candidates for public office by filing a certificate signed by electors, and under section 6 (Rev. Laws, 1838), which provides that no one shall join in nominating more than one nominee for each office to be filled, a certificate signed by the requisite number of electors is not vitiated by signers subsequently signing another certificate nominating another person for the same office, but duplicate signatures are invalid as to the subsequent certificate.

2. FORFEITURES — PENALTIES.

Penalties and forfeitures are not favored, unless plainly expressed.

ORIGINAL PROCEEDING for writ of *mandamus*, by the State, on relation of John F. Miller, against Harley A. Harmon, County Clerk of Clark County. **Writ granted.**

The facts sufficiently appear in the opinion.

Richard Busteed, for Relator:

It was not the intention of the legislature to throw open the door to fraud. If the clerk has the power claimed by him, he could throw out a perfectly valid certificate after filing by reason of his acceptance for filing of a later one. There would be absolutely no protection to one filing such a prior certificate in good faith, as against a later and fraudulent one accepted for filing at the last moment. Public policy, if there were no other reason, would be against such construction of the statute.

F. A. Stevens, for Respondent:

If a signer's name appears upon more than one petition for the same office it cannot be counted for any candidate. (*Southall v. Griffith*, 100 Ky. 91, 37 S. W. 577; *O'Connor v. Smithers*, 99 Pac. 46, and authorities therein cited; 15 Cyc. 335.)

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The general law is to the effect that the officers with whom certificates of nomination are filed are not limited merely to passing upon the form of the certificate, but they may also pass upon the sufficiency. (15 Cyc. 340, note 78.)

Per Curiam:

[1] This proceeding presents the sole question of the proper construction of section 6 of "An act relating to elections and to more fully secure the secrecy of the ballot," approved March 13, 1891 (Stats. 1891, c. 40; Rev. Laws, 1838). So much of the section as is involved in this proceeding reads: "No person shall join in nominating, under the provisions of section 4 of this act, more than one nominee for each office to be filled. * * *" Section 4 of the aforesaid act, referred to in section 6, *supra*, makes provision for the nomination of candidates for public office by the filing of a certificate containing certain required information, which "shall be signed by electors residing within the district or political division for which candidates are to be presented equal in number to at least ten per cent of the entire vote cast at the last preceding general election in the state, district, or political division for which the nomination is made."

An agreed statement of facts is filed, from which it appears that the petitioner on October 1, 1912, filed his certificate of nomination as a candidate for the "Independent party" for the office of county commissioner for said Clark County for the long term, to be voted for at the next ensuing general election; that said certificate was signed by 105 qualified electors of said county; that said number of electors constitutes more than ten per cent of the entire vote cast in said county at the last preceding general election; that the said certificate in all other respects was in due form; that thereafter, on the 4th day of October, 1912, and within the time prescribed by law, the certificate of nomination of one J. L. Russell as candidate of the Socialist party for the same office was filed with the respondent; that the certificate of said

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Russell was signed by 125 qualified electors of said county; that the certificate of said Russell was in all other respects in due form; that the names of 31 of the signers of the certificate of nomination of the petitioner appear on the certificate of nomination of said Russell; that the certificate of nomination of said Russell was not circulated until after the certificate of nomination of petitioner had been circulated, signed, and filed with the respondent; that the respondent has refused and still refuses to place the name of the petitioner upon the official ballot, basing his refusal upon the ground that the 31 electors who signed both said petitions should not be counted; that, if the said 31 signatures are not entitled to be counted, the certificate does not contain the signatures of the requisite ten per cent of qualified electors.

Counsel for the respective parties have submitted the following as points in controversy:

"(1) Whether or not the county clerk, defendant, has the right to eliminate from the count of the signers to plaintiff's certificate of nomination the 31 names appearing upon the certificate of nomination of both plaintiff and J. L. Russell.

"(2) If so eliminated, is the county clerk justified in refusing to publish the nomination of plaintiff, and in omitting the plaintiff's name from the ballot as a candidate at the general election for said office of long-term county commissioner?

"(3) Whether the fact that plaintiff's certificate of nomination was circulated, signed, and filed prior to the circulation of the certificate of nomination of J. L. Russell would prevent the county clerk from eliminating the duplicated names from the certificate of nomination of plaintiff."

We think the language used in section 6, *supra*, means only that, when an elector has signed a certificate of nomination of a candidate for a public office representing a certain party or principle, he is disqualified from thereafter signing another petition of nomination of another

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candidate for the same office, and he may also be prohibited from nominating the same candidate for the same office, but as representing some other party or principle. There is no specific provision in the statute making a duplicate signature of an elector void as to all certificates, as is provided in the statute of Kentucky and referred to in the case of *Southall v. Griffith*, 100 Ky. 91, 37 S. W. 577, cited.

The case of *O'Connor v. Smithers*, 45 Colo. 23, 99 Pac. 46, is more nearly in point. The statute of Colorado, involved in the latter case provides: "No person shall sign more than one certificate of nomination for any office." In the latter case the facts were that two certificates for the nomination of certain identical legislative candidates (one certificate designated as "Business" ticket, and the other "Anti-Guggenheim" ticket) were tendered the secretary of state at the same time. The law of Colorado required that each certificate be signed by not less than 100 qualified electors. Each certificate tendered was signed by 115 names, but upon examination the court found that not less than 46 names were the same upon each certificate. Considering the law of the case, the court said: "An elector, once having exercised the right to join in a certificate as an individual nominating a candidate for office under some name adopted by the signers, cannot join in nominating the same person for the same office under some other name. Having exercised the right once, he is precluded from exercising it again under such circumstances. The purpose of the statute in allowing nominations by individuals was to confer upon electors the right to place candidates in nomination under some party name which they might choose representing a principle which they desired to support at the polls; but it was never intended (and, in fact, is inhibited by the statute last above referred to) that they could exercise this right indefinitely, by duplicating the nomination of candidates for the same offices to be voted for at the same election under different names. If the rule were otherwise, the official

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ballot could be made to contain the names of the different parties under which a candidate had been nominated to an extent which would render it more confusing and unintelligible than it now is, when all the protection which the law affords against such conditions is enforced. In short, the law is that an elector, having once joined in nominating a candidate by a certificate of individuals, cannot thereafter join in nominating that same candidate in the same way for the same office under another party name, to be voted for at the same election, for the reason that, having once exercised the right of choice of candidates and principles, so far as nominations are concerned, he cannot exercise it again. Authorities sustaining this conclusion are *In re Smith*, 41 Misc. Rep. 501, 85 N. Y. Supp. 14; *Phillips v. Curtis*, 4 Idaho, 193, 38 Pac. 405; *Southall v. Griffith*, 100 Ky. 91, 37 S. W. 577. From this conclusion it is apparent that the certificates nominating candidates for the legislative and senatorial districts did not contain the requisite number of names to make a nomination by individuals, for the obvious reason that all duplicate names on these certificates for the same candidates for the same office must be eliminated. Hence they were invalid. (*Southall v. Griffith*, *supra*; *State v. Lesueur*, 136 Mo. 452, 38 S. W. 325; *In re Official Ballot*, 99 Minn. 517, 109 N. W. 1; *In re Horan*, 108 App. Div. 269, 95 N. Y. Supp. 607.)"

It was necessary to eliminate from consideration all duplicate names upon the two certificates considered in the Colorado case, for the reason that the two certificates "were tendered the secretary of state at the same time." We do not, however, interpret the Colorado court as holding that, in every case where an elector signs more than one certificate, his signature to all should be disregarded. If the court intended to so hold, we would not be able to agree in its construction of the statute. An elector may make one valid signature to one petition for the nomination of a candidate for a particular office. Having signed one such certificate, he becomes disqualified to sign

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another for the same office, and, if he does so again sign, such signature should not be counted; but such subsequent signature does not render the first void. The provision that no person shall join in nominating more than one nominee for each office to be filled certainly implies and allows an elector to join in nominating one nominee for the office; but, as soon as he has joined in nominating one nominee, the prohibition attaches against his joining in the nomination of any other person for the same office.

[2] Penalties and forfeitures are not favored, unless plainly expressed. There is no provision in our statute, as in some states, that if an elector signs the nominating certificates of two persons for the same office the signatures of both will be void. In this case the certificate of the petitioner, Miller, was signed by the requisite number of electors and filed before the petition of Russell was ever circulated, and several days before it was filed. Miller had done everything required by law to entitle his certificate to be filed and to have his name placed upon the ballot. If, after his certificate had been properly signed and filed, it could be invalidated because some of the signers later signed other petitions, when there is no statute warning him that, unless he obtained a surplus of signers larger than any that might be induced by any means to sign other petitions for the same office, he could have his certificate invalidated, no candidate would be safe; for he might be deprived of the nomination after he had filed his certificate with the requisite number of proper signers by an opposing candidate who could file a certificate bearing enough original signers to nominate him, with the addition of enough of the signers on the first certificate signed and filed to bring the qualified names on it below the required number. All duplicate signatures were void so far as the petition of Russell was concerned, but that did not make invalid the same signatures on the relator's petition, which were valid when signed. We appreciate that cases might arise

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when it would be difficult to tell upon which petition the name should be counted.

We do not wish to be understood as holding that where two petitions are presented to the clerk, which have not the required number of signers without counting the names of the electors who have signed both, the clerk may not refuse to file either until some showing is made that enough of the signers were first signers; nor that, if two petitions are filed or offered for filing together or at different times for the same office, the clerk may not refuse to certify the name or names to the ballot until such showing is made. Where it can be determined to which petition the signature of an elector signing more than one certificate was first appended, it should be credited to that petition and disregarded as to all others.

Under the requirements of a statute reading: "No person shall join in nominating more candidates for any office than there are persons to be elected thereto," Spencer, J., in *Re Smith*, 41 Misc. Rep. 501, 85 N. Y. Supp. 14, said: "I think the intent of this provision is plain that a man, having once joined in nominating a candidate, shall not thereafter join in nominating another for the same office at that election; * * * that if any person joined in the certificate who had joined in nominating another candidate, his signature to the certificate is of no avail, and must be disregarded."

The certificate of nomination of the petitioner is valid, and the respondent is directed and required to treat the same as all other certificates of nomination recognized by him as valid.

Points decided

[No. 2009]

W. J. DOUGLASS (AS TRUSTEE), APPELLANT, v. THOMPSON, MOREHOUSE & THOMPSON, RESPONDENTS.**1. APPEAL AND ERROR—NOTICE OF APPEAL—FORM.**

While it is better practice to direct notice of appeal to all of the parties who, under any circumstances, might have adverse interests on the appeal, under the statute, if notice be served upon the adverse parties, it is sufficient.

2. APPEAL AND ERROR—NOTICE OF APPEAL—TIME.

Where it is provided by statute that an appeal is taken by the filing and service of a notice of appeal, but that an appeal shall not be effectual unless an undertaking thereon is filed within five days thereafter, the failure to file the undertaking within the time prescribed does not prevent the filing of a new notice with an undertaking thereafter, providing the time to appeal has not expired.

3. APPEAL AND ERROR—MORTGAGEE IN POSSESSION—ACTION FOR RENTS—COMPLAINT.

A complaint for the collection of rents alleged that a deed, absolute in form, was given to plaintiff by a bank, and that plaintiff gave back to the grantor a written declaration that the premises were held as security for the repayment of money deposited in the bank by plaintiff and by another depositor; that, as part of the arrangement, it was agreed that plaintiff should have possession of the premises and the rentals thereof; and that plaintiff thereafter took possession, and notified defendants of the transfer. *Held*, that the complaint was based on the theory that plaintiff was a mortgagee in possession, not by virtue of the conveyance, but under an independent agreement therefor which had been executed, so that evidence of plaintiff's entry into possession after the date of the deed and the defeasance was improperly rejected.

4. EVIDENCE—PAROL EVIDENCE—DELIVERY OF POSSESSION—AGREEMENTS.

An executed oral agreement to deliver the possession of mortgaged property is valid, and such agreement, whether made at the time of the execution of the mortgage or subsequent thereto, is an agreement independent of the mortgage, and cannot be regarded as an oral agreement, varying or contradictory to the terms of a contract in writing.

APPEAL from the Seventh Judicial District Court, Esmeralda County; *Peter J. Somers*, Judge.

Action by W. J. Douglass, as Trustee, against J. S. Thompson and others. Judgment in favor of defendants, and plaintiff appeals. **Reversed.**

The facts sufficiently appear in the opinion.

Argument for Appellant

McIntosh & Cooke, for Appellant:

The word "recover," as used in section 5520 of the Revised Laws, relating to mortgages, has reference to an action at law. (*Jackson v. Lodge*, 36 Cal. 28; *Norton v. Winter*, 62 Am. Dec. 297; *Atchinson v. Owensboro*, 71 S. W. 864; 27 Cyc. 1237; 34 Cyc. 763-4; Black's Law Dict. 1006; 24 Am. & Eng. Ency. Law, 211.)

The general rule undoubtedly is that it is entirely competent for the parties to a mortgage to make an arrangement as to the possession or right of possession of the mortgaged premises other than that which the law would determine in the absence of an agreement. (27 Cyc. 1237, note 65, and cases cited; *Dutton v. Warschauer*, 21 Cal. 609.)

The agreement for possession may be made by a separate agreement given at the same time with the mortgage. (27 Cyc. 1237, note 67, citing *Clay v. Wren*, 34 Me. 187; *Fogarty v. Sawyer*, 17 Cal. 589.)

Agreement for possession may be made by a parol agreement contemporaneous with the mortgage or subsequent to it. (27 Cyc. 1237, note 68, citing *Brundage v. Home Sav. Assn.*, 39 Pac. 666; *Edwards v. Wray*, 12 Fed. 42.)

Possession taken by consent of the mortgagor or under an agreement gives the mortgagee the rights of a mortgagee in possession. (*Jones v. Rigby*, 43 N. W. 390; *Brundage v. Bank*, 39 Pac. 666; *Spect v. Spect*, 26 Pac. 203; *Fogarty v. Sawyer*, 17 Cal. 589; *Railroad Co. v. Moore*, 121 U. S. 558; *First Nat. Bank v. Bell M. Co.*, 19 Pac. 403; *Johnson v. Sherman*, 15 Cal. 287, 76 Am. Dec. 481; *Jackson v. Lodge*, 36 Cal. 28; *Barrett v. Timberlake*, 57 Mo. 499; *Rice v. Ry. Co.*, 24 Minn. 464; *Bullion and Exchange Bank v. Otto*, 59 Fed. 256; *Cook v. Cooper*, 22 Pac. 945, 78 L. R. A. 273, 22 Am. St. Rep. 314; *Kelso v. Norton*, 70 Pac. 896; *Rogers v. Benton*, 38 N. W. 755, 12 Am. St. Rep. 613; *Stouffler v. Harlon*, 74 Pac. 610; *Hopper v. Young*, 74 Pac. 140; *Yingling v. Redwine*, 69 Pac. 810; *Becker v. McCrea*, 94 N. Y. 20; *Howell v. Leavitt*, 95 N. Y. 617; 20 Am. & Eng. Ency. Law, 1004.)

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The foregoing establishes the legal proposition that under our statute a mortgagor may agree to deliver possession to mortgagee, and it is utterly immaterial whether in point of time, such agreement is contemporaneous with the mortgage transaction or subsequent thereto. There is absolutely no room for any question of public policy, and its attempted application is absurd.

Thompson, Morehouse & Thompson, for Respondents:

The appeal should be dismissed. All adverse parties were not served with notice. (*Ford v. Truman*, 89 Pac. 1071; *Harper v. Hildreth*, 99 Cal. 268; *Anderson v. Red M. Co.*, 93 Pac. 44; *Kramer v. March*, 90 Pac. 583; *Vaught v. Bank*, 111 Pac. 214.)

The filing and service of the notice of an appeal was an appeal. The law nowhere gives the right of a new notice. If the plaintiff dismiss, that ends his right. (*West v. Dygert*, 92 Pac. 753; *Bard v. Wilson*, 102 Pac. 301.)

The whole tenor of the complaint is that he owns the property, and that Lockhart, as receiver, sets up a claim to the property and that such claim of ownership on the part of Lockhart is without right—a plain action to quiet title against Lockhart—an action which could not be maintained at all, as a mortgagee in possession, because by section 3343 of the Compiled Laws there is but one action "for the enforcement of any right secured by mortgage or lien upon real estate or personal property" which is an action of foreclosure.

His only remedy, whether mortgagee in possession or out of possession, as a mortgagee, is an action to foreclose the mortgage. Therefore, by this complaint, the plaintiff must stand or fall upon an absolute ownership of the premises as a grantee and not as a mortgagee. The very moment it appears in proof that he is not an absolute grantee, but a mortgagee, his action falls, and he is out of court, against Lockhart as receiver, and against Thompson, Morehouse & Thompson, as his tenants by virtue of his ownership as a grantee—the

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only ownership he can rely upon in this action—and all testimony of mortgagor and mortgagee, or any such relation, is wholly incompetent. (*Hyman v. Kelly*, 1 Nev. 179.)

As plaintiff has not sued as a mortgagee to foreclose his mortgage, these defendants could not attorn to him, as landlord, and become his tenants. (Jones on Mortg., 5th ed. sec. 777, p. 741; Taylor, L. & T., 9th ed. sec. 180; Comp. Laws, 2686.)

The issue, therefore, was title in the plaintiff and tenancy of these defendants. The moment the transaction becomes a mortgage plaintiff's action fails because plaintiff could not be the landlord of these defendants, as he alleges. (*Warnock v. Hareon*, 96 Cal. 298; *Emerson v. Weeks*, 58 Cal. 439; *Ramivex v. Murray*, 5 Cal. 222.)

Now, however, later on plaintiff gives up the absolute character of the deed, and seeks to change his cause of action, and says: "So far as the defendants Thompson, Morehouse & Thompson are concerned, the action is not based upon any mortgage relation, but is based upon our being a mortgagee in possession and entitled to collect the rents, and, if they are not paid without suit, then to sue for them and invoke the process of law."

Here is a cause of action wholly different from the one upon which we are sued. Here there is no relation of tenancy at all. They seek now, as agents or bailees of the bank, to sue upon the rights of the bank as landlord. (Jones on Mortg., sec. 1115, 5th ed.; *Hubbell v. Moulson*, 53 N. Y. 225.)

As the mortgagee's only remedy is foreclosure and sale, he is never entitled to the rents and profits until a decree of foreclosure, when, by the decree on an accounting, he is allowed to apply the same on the mortgage debt. Until such decree the rents belong absolutely to the mortgagor. This principle of law is elementary and is the rule both at common law and under the statutes. (Jones on Mortg., sec. 775, 5th ed.)

The complaint alleges: "and as part of the agreement." Now the agreement was in writing, and is attached to

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the complaint as "Exhibit B," and in that agreement there is not a word about plaintiff having possession of the premises or the right to collect the rents, or any transfer of rents at all. The agreement, being in writing, interprets itself. Oral evidence is not admissible to change it. There is no ambiguity, no indefiniteness, in the contract. It is complete, intelligible, and perfect. The rule is elementary that when there is no mistake or fraud alleged in the complaint, and no uncertainty or ambiguity in the contract, that no evidence is admissible of a different term or understanding of the contract, or of a contemporaneous separate agreement. (*Johnson v. D. H. B. L. Co.*, 73 Pac. 730; *Beall v. Fisher*, 95 Cal. 568.)

The averment of a contract for possession and rents, as "part of the agreement," cannot be proved, and is surplusage and nugatory in the complaint. (*Nanneberg v. Young*, 44 N. J. L. 331.)

The complaint does not plead a separate and distinct contract, nor a subsequent contract, but as "part of the same contract." Therefore, to admit oral testimony of the kind alleged in the complaint adds something to the written contract. (*Travis v. Epstein*, 1 Nev. 116; *Grey v. Bisbend*, 41 Cal. 322; *Bradford v. Joost*, 117 Cal. 209; 2 Parsons on Contracts, 8th ed. star p. 548.)

Under Comp. Laws, 3357, the mortgagor could not agree to the possession of the mortgagee, except by foreclosure and sale, because such an agreement was contrary to the policy of our law, and certainly could not so agree, in the mortgage transaction itself. (Pomeroy, Eq. Juris., sec. 1193; *Teal v. Walker*, 111 U. S. 242; *Couper v. Shirley*, 75 Fed. 168; *Hazleton v. Granger*, 44 Mich. 503; *Brundage v. Bank*, 39 Pac. 666; *Norfor v. Busby*, 53 Pac. 715; *Wagner v. Stone*, 36 Mich. 364; *Thompson v. Shirley*, 69 Fed. 484; *Freeman v. Campbell*, 109 Cal. 360.)

By the Court, NORCROSS, J. :

This is an action by the plaintiff, appellant herein, to recover a judgment for rents alleged to be due and owing to plaintiff from the defendants Thompson, Morehouse & Thompson on account of the use and occupancy of

certain office rooms in a certain building in the town of Goldfield known as "the Nye and Ormsby County Bank Building," and to quiet plaintiff's right or title to said rents as against the other defendants, Lockhart and Gilbert. From a judgment entered upon a nonsuit in favor of these defendants, Thompson, Morehouse & Thompson, as against the plaintiff, the latter has appealed.

Counsel for respondent have moved to dismiss the appeal upon the ground that this court is without jurisdiction thereof for the reason that all of the adverse parties to the suit were not made parties to the appeal, and for the further reason that there is no valid notice or undertaking. The notice of appeal was directed only to the defendants Thompson, Morehouse & Thompson, but the notice was served upon the counsel of record for the other defendants in the action. The interests of defendant Gilbert upon the appeal can hardly be considered as adverse to those of the plaintiff, and, as to him, service of the notice may not have been necessary. It appears that, after the judgment and before the taking of the appeal, a change had been made in the receivership of the Nye and Ormsby County Bank, but no substitution had been made in the case. Service of the notice of the appeal was made upon counsel, both for the receiver as named in the proceedings and his successor.

[1] There is no prescribed statutory form for a notice of appeal. While a better practice doubtless would be to direct the same to all of the parties in the action who might under any possible circumstances be deemed to have any adverse interests upon the appeal, nevertheless all that the statute requires is that the notice be served upon the adverse parties. The objection as to the form of the notice and sufficiency of the service is not well taken.

[2] A notice of appeal dated November 21, 1911, was filed November 22, 1911, and service thereof acknowledged upon the following day. No undertaking upon appeal was filed within five days thereafter. On November 29, 1911, a second notice of appeal was filed and

served, and within five days thereafter an undertaking upon appeal was filed. The second notice of appeal and the undertaking were filed within the time prescribed by law for taking appeals from final judgments. It is the contention of counsel for respondent that the plaintiff has lost his right to appeal by failing to file an undertaking within five days after filing the first notice of appeal; that no other valid notice could be therefor filed. If this contention is correct, this court would of course be without jurisdiction, and the appeal should be dismissed.

It is provided by statute that an appeal is taken by the filing and service of a notice of appeal, but that an appeal shall not be effectual for any purpose unless an undertaking thereon is filed within five days thereafter. Failing to file the undertaking within the prescribed time renders the notice of appeal ineffectual, but we see no reason why a new notice may not thereafter be filed, providing time for appeal has not expired. (*Columbet v. Pacheco*, 46 Cal. 650, 651; *Vordermark v. Wilkinson*, 147 Ind. 59, 46 N. E. 336; *Bornheimer v. Baldwin*, 42 Cal. 27; *Holladay v. Elliot*, 7 Or. 483; 2 Cyc. 529, 530.) The complaint, among other matters, alleges: "That on said February 5, 1909, said Nye and Ormsby County Bank duly made, executed, and delivered to plaintiff a deed of conveyance absolute of said premises. * * * That thereafter, on or about February 6, 1909, said plaintiff executed and delivered to said Nye and Ormsby County Bank, and to said defendant, R. F. Gilbert, a certain instrument in writing, declaratory of the conditions under which the title of said lot and building was held by plaintiff. * * *" The instrument last referred to is attached to the complaint as an exhibit, and reads as follows "Whereas, W. J. Douglass, as the manager and secretary of the Midway Mining Company, has deposited with the Nye and Ormsby County Bank, a corporation, certain moneys belonging to and the property of said Midway Mining Company, for the safe-keeping of which moneys said W. J. Douglass is primarily liable,

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and, whereas, R. F. Gilbert, county treasurer of Nye County, Nevada, as such treasurer has deposited with the said Nye and Ormsby County Bank, a corporation, certain moneys belonging to the county of Nye, which moneys came into possession of said Gilbert as county treasurer, and for the safe-keeping of which moneys said Gilbert and his bondsmen on his official bond are primarily liable, and, whereas, said Nye and Ormsby County Bank has, by a deed absolute in form, conveyed to said W. J. Douglass certain property in Goldfield, Esmeralda County, Nevada, known as the First National Bank building, together with the real estate on which the same is situated, the purposes for which said property was so conveyed to W. J. Douglass being that he hold the same as security for the repayment to him and to said R. F. Gilbert, as county treasurer, of all moneys deposited by them with said Nye and Ormsby County Bank, and for the complete protection of said W. J. Douglass and R. F. Gilbert, as county treasurer, and his bondsmen. Now, therefore, said W. J. Douglass agrees to hold said property so conveyed to him for the uses and purposes above set forth, and further agrees to reconvey said property to said Nye and Ormsby County Bank when said uses and purposes have been performed and accomplished. [Signed] W. J. Douglass." The complaint further alleges: "That on or about said February 5, 1909, and as a part of the agreement so aforesaid entered into for the conveying of said premises to plaintiff, it was also agreed by and between said Nye and Ormsby County Bank, the defendant R. F. Gilbert, and plaintiff herein, that the actual and exclusive possession and right of possession, together with all rents, issues and profits, of all and singular the said premises should be, and the same were then and there, surrendered, set over, transferred and delivered to plaintiff, and that all leases and all rentals accrued or accruing, or thereafter to accrue, from said premises, including the amount due from the defendants Thompson, Morehouse & Thompson, as hereinafter stated, were duly surrendered,

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assigned, transferred and set over by said defendant Nye and Ormsby County Bank to plaintiff. That thereupon said plaintiff entered into and took the quiet and peaceable possession of said premises, and ever since had held and now holds the actual and exclusive possession thereof, subject to any valid and subsisting leases, and that said defendants Thompson, Morehouse & Thompson were duly notified of said conveyance and assignment on or about said February 6, 1909."

Plaintiff offered to prove that a few days after February 6, 1909, and prior to March, 1909, the Nye and Ormsby County Bank, through its authorized officers, and while still doing a banking business, agreed with plaintiff that he should take absolute and exclusive possession of the building in question, with the right to collect all rents, and that plaintiff was at that time placed in actual possession thereof; that plaintiff at once notified the tenants and collected some rents from respondents Thompson, Morehouse & Thompson, who paid said rents with knowledge that plaintiff was in possession. Objection was made to this offer upon the ground that a mortgagor, for reasons of public policy, cannot make a valid agreement of the kind sought to be proved. The objection was sustained upon the ground that such an agreement would be invalid as contrary to the public policy of the state as expressed in Compiled Laws, section 3357. Objections to a number of questions propounded to the plaintiff and other witnesses for the purpose of showing the alleged agreement and plaintiff's entry into the possession of the building in question in pursuance thereof, with the knowledge and approval of the officers of the Nye and Ormsby County Bank, were for the same reasons sustained. Objection was also sustained to the offer to prove an agreement and entry of possession and assignment to the plaintiff of the rents and profits of the building at any time subsequent to the 5th day of February, 1909, upon the ground that such proof was not within the issues made by the pleadings. A request to amend

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the complaint so as to obviate the latter objection was denied upon the ground that it would introduce a new and separate cause of action. Section 3357 of Cutting's Compiled Laws, upon which the court based its rulings, reads: "A mortgage of real property shall not be deemed a conveyance, whatever its terms, so as to enable the owner of the mortgage to recover possession of the real property without a foreclosure and sale." (Rev. Laws, 5518.) In ruling upon certain of the objections to testimony, the position of the trial court as to the law of the case was stated as follows: "The complaint sets forth that it is by virtue of said deed, which must be construed to be a mortgage, that the claim against Thompson, Morehouse & Thompson in behalf of Douglass arises; that the making of said deed of transfer in effect constitutes, among other things, an assignment of rents due and to become due. * * * Concerning the authorities cited by the learned counsel for the plaintiff in this case, it must be said that they relate to cases where the mortgage itself, or conveyance, is not relied upon to convey the rents. They depend wholly upon subsequent transactions to the making of the mortgage. It is held by those authorities, and properly so, that, at a time subsequent to the making of the mortgage, the mortgagee may take possession with the consent of the mortgagor, without violating the policy of the statute; and to that effect the parties may make a subsequent contract. But in the case at bar it is the deed itself, construed as a mortgage, which is relied upon as assigning the rents and authority to collect the same. I am of impression that this conveyance does not transfer the rents, issues, and profits of the tenement in question, and that, under the complaint, testimony of the character offered cannot be received against the defendants Thompson, Morehouse & Thompson, or against the receiver. * * * Of course if the Nye and Ormsby County Bank gave Mr. Douglass permission to enter upon the premises after the mortgage was due, then Douglass would be a mortgagee in possession, with the consent of the mortgagor; that

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a sale of the premises, the mortgagee consenting thereto, to pay off the debt. Nor is it perceived that there is any legal obstacle to making such contract with the mortgagee or to clothing him with the power of sale. If the owner of the property sees fit to enter into such an arrangement with him, or to confer such power upon him, it would be going a great way for the court, for that reason alone, to invalidate the proceedings. The right to dispose both of the possession and estate follows necessarily from the ownership of the property, and, this being so, no valid objection can be urged against incorporating the contract and power in the same instrument with the mortgage. They do not become in that way any part of the mortgage, but are as much independent of it as though contained in separate instruments. Some stress is placed by the respondent upon the use of the words "whatever its terms" in the statute. This language is supposed to prohibit separate stipulations between the parties for the possession and for the sale of the premises upon default. We do not thus construe the language, but, on the contrary, are clear that it was only intended to control the terms of grant, bargain, and sale generally employed in mortgages.' We agree to what is stated by the court in that case. There is nothing in the law of mortgages, nor in the law that covers what are sometimes designated as trust deeds in the nature of mortgages, which prevents the conferring by the grantor or mortgagor in such instrument of the power to sell the premises described therein upon default in payment of the debt secured by it, and, if the sale is conducted in accordance with the terms of the power, the title to the premises granted by way of security passes to the purchaser upon its consummation by a conveyance." (*Bell Mining Co. v. First Nat. Bank*, 156 U. S. 470, 15 Sup. Ct. 440, 39 L. Ed. 497.)

In *Kelso v. Norton*, 65 Kan. 778, 70 Pac. 896, 93 Am. St. Rep. 308, the court said: "At common law a mortgagee was entitled to possession and to recover possession from the mortgagor upon condition broken. In this state, by force of statute, a mortgage retains but

few, if any, of its common-law attributes. It is a mere security contract, incident to the debt. The mortgagor, both before and after default, is entitled to the possession of the premises. The only legal right of the mortgagee is to foreclose the equity of redemption and obtain a decree of sale in satisfaction of his debt. While such are the legal rights of the mortgagor and mortgagee in this state, it does not follow that these legal rights may not be changed or waived by agreement, express or implied. If the mortgagor consents to the mortgagee's taking possession of the premises for the better security of his debt, and the mortgagee does take possession, it is clear that the possession thus taken will constitute 'a mortgagee in possession.' "

In *Spect v. Spect*, 88 Cal. 437, 26 Pac. 203, 13 L. R. A. 137, 22 Am. St. Rep. 314, the Supreme Court of California said: "The right of the mortgagee to take possession of the mortgaged premises does not depend upon the statute. The mortgagor could at all times, even by a parol agreement, give to his mortgagee this additional security. (*Fogarty v. Sawyer*, 17 Cal. 589; *Edwards v. Wray*, 11 Biss. 251, 12 Fed. 42.) In taking such possession, the mortgagee does not thereby acquire any estate in the land, or obtain for his mortgage any higher character, or any different or greater protection than it would otherwise have possessed. In any action to enforce the mortgage, or to collect the debt for which it was given as security, the mortgagee has no additional rights by reason of the fact that he is in possession of the mortgaged premises with the consent of the mortgagor. Such possession does, however, give him rights in addition to those conferred by the mortgage. It is an additional security for the debt, which he is entitled to retain in accordance with the terms under which it was received. This right to retain the possession of the land is not coincident with a right to foreclose his mortgage or dependent upon such right, but depends solely upon the existence of the debt. The possession of the land is a special security for the debt, distinct and separate from the mortgage, which has been conferred by

an act of the debtor, and the right to retain the same is independent of and distinct from any right springing from the mortgage. A mortgage is defined by section 2920 of the civil code to be 'a contract by which specific property is hypothecated for the performance of an act, without the necessity of a change of possession.' The use of the term 'hypothecate' signifies that possession is not an incident of the mortgage, and that the fact of possession is entirely distinct from the contract of hypothecation. When, therefore, in addition to the contract of hypothecation the debtor gives to his creditor the possession of the mortgaged premises, he thereby, in addition to the mortgage which he has executed, also pledges the land to him as security for the debt, and confers upon him such rights as are incident to a pledge. The common law recognized this species of landed security. It was there called *vadium vivum*, as distinguished from the *vadium mortuum*. This is defined by Chancellor Kent to be: 'When the creditor takes the estate to hold and enjoy it without any limited time of redemption and until he repays himself out of the rents and profits. In that case the land survives the debt, and when the debt is discharged, the land, by right of reverter, returns to the original owner.' (4 Kent's Com. 137; 2 Bl. Com. 157; Co. Lit. 205a.) The holding of the land in pledge is like the holding of any other pledge. Until the debt is repaid, the owner of the pledge cannot recover it from the creditor. The holder of personal property given as security for a debt is entitled to retain the same from the owner until the debt is satisfied, even though the statute of limitations has barred all right of action to recover the debt. (*Jones v. Merchants' Bank*, 4 Rob. N. Y. 221.) Under the same principle, the mortgagee in possession is entitled to retain such possession until the debt is paid. 'The mortgagee's right being in possession to defend himself against an ejectment by the mortgagor, is but a right to retain the possession of the pledge for the purpose of paying the debt. Such a right is but the incident of the debt, and has no relation to a

title or estate in the lands.' (*Kortright v. Cady*, 21 N. Y. 343, 78 Am. Dec. 145.) 'On the same principle that the party who holds goods in pledge for a debt may retain those goods, even after an action at law upon such debt has been barred, the party who has got the rightful possession of land mortgaged may retain possession thereof until his debt is paid, although he can bring no action to enforce the debt.' (*Henry v. Confidence M. Co.*, 1 Nev. 622.) In *Dutton v. Warschauer*, 21 Cal. 625, 82 Am. Dec. 765, it is said: 'When possession is taken by the mortgagee after condition broken, by consent of the mortgagor, it will be presumed, in the absence of clear proof to the contrary, to be with the understanding that the mortgagee is to receive the rents and profits and apply them to the payment of the debt secured. There is, indeed, no other good reason why the mortgagee should be let into possession in preference to any other party, and, unless a limitation to the period of possession is fixed at the time, it will be considered as extending until the satisfaction of the debt. Having thus entered, the mortgagee can hold against the mortgagor and all others until such satisfaction is obtained.' "

Hawley, J., delivering the opinion of the court in the case of *Bullion and Exchange Bank v. Otto* (C. C.), 59 Fed. 256, said: "It is claimed that the oral agreement of M. E. Spooner with the bank to deliver the possession of the real estate was within the statute of frauds. But the question is not whether the oral agreement could have been enforced if M. E. Spooner had refused to deliver the possession. The statute only affects the parties to the agreement. The facts are that M. E. Spooner delivered the possession to Marshall for the mortgagee, and, the agreement having been executed, it is valid between the parties. The defendants are certainly not in a position to urge the statute of frauds as a defense to this suit. (*Book v. Mining Co.*, 58 Fed. 106.) The right to make such an oral agreement is well settled, and the effect of such an agreement, and of the possession taken thereunder, is clearly and correctly

stated in *Spect v. Spect*, 88 Cal. 440, 26 Pac. 203, 13 L. R. A. 137, 22 Am. St. Rep. 314."

[4] An executed oral agreement to deliver the possession of the mortgaged property is valid. Such agreement, whether made at the time of the execution of the mortgage or subsequent thereto, is an independent agreement and no part of the mortgage. (*Fogarty v. Sawyer, supra; Bell Mining Co. v. First Nat. Bank, supra.*) The fact that the plaintiff alleged that the agreement to deliver possession of the mortgaged premises was "a part of" the other agreements alleged and which were in writing is, we think, immaterial. It may have been a part of the transactions which involved the giving of the mortgage, but, strictly and legally, it was an independent agreement. Even if made contemporaneous with the mortgage, the agreement to deliver possession cannot be regarded as an oral agreement varying or contradictory to the terms of a contract in writing, for the reason that it is an independent agreement. (*Travis v. Epstein*, 1 Nev. 116.)

We think it was competent for the plaintiff to show that he had entered into the possession of the property described in the deed of February 5, 1909, with the consent of the Nye and Ormsby County Bank, and that the court committed prejudicial error in sustaining the objections to the evidence offered. If plaintiff could show that he had acquired possession of the property with the consent of the mortgagor, then he became a mortgagee in possession and entitled to the rights that accrue to a mortgagee in possession. In addition to the authorities quoted, *supra*, we cite the following as sustaining our conclusions: *Brundage v. Bank*, 11 Wash. 288, 39 Pac. 669; *Jones v. Rigby*, 41 Minn. 530, 43 N. W. 390; *Rogers v. Benton*, 39 Minn. 39, 38 N. W. 765, 12 Am. St. Rep. 613; *Teal v. Walker*, 111 U. S. 242, 4 Sup. Ct. 420, 23 L. Ed. 415; *Cooke v. Cooper*, 18 Or. 142, 22 Pac. 945, 7 L. R. A. 273, 17 Am. St. Rep. 709; *Stouffer v. Harlan*, 68 Kan. 135, 74 Pac. 610, 64 L. R. A. 320, 104 Am. St. Rep. 396; *Cummings v. Cummings*,

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75 Cal. 434, 17 Pac. 442; *Keeline v. Clark*, 132 Iowa, 360, 106 N. W. 257; *Benton Land Co. v. Zeitler*, 182 Mo. 251, 81 S. W. 193, 70 L. R. A. 94; *Huguley v. Galetton Cotton Mills*, 94 Fed. 269, 36 C. C. A. 236; 27 Cyc. 1237, 1250; *Jones on Mortgages*, 6th ed. sec. 702.

We think the evidence offered was within the pleadings as framed, and that an amendment was unnecessary. However, we need not consider the alleged error in the refusal of the court to permit an amendment. It is further contended that the court erred in granting the motion for a nonsuit for the reason that the court had admitted some evidence showing that the plaintiff was in possession as mortgagee, but, as the judgment must be reversed for the erroneous rulings as to evidence offered, it will not be necessary to determine this question.

Judgment is reversed and cause remanded for a new trial.

SWEENEY, C. J., did not participate in the foregoing decision.

Points decided

[No. 2024]

THE STATE OF NEVADA, EX REL. PACIFIC RECLAMATION COMPANY AND GEO. M. BACON, RELATOR, v. EDWARD A. DUCKER, JUDGE OF THE SIXTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF HUMBOLDT, RESPONDENT.

1. APPEAL AND ERROR—STATUTES—REPEAL BY IMPLICATION.

Section 387 of the practice act, effective January 1, 1912 (Rev. Laws, 5329), provides that an appeal may be taken (2) from an order granting or refusing a new trial, or refusing to grant or dissolve an injunction, or refusing to appoint a receiver, or refusing to change the place of trial, and from any special order made after final judgment within sixty days after made and entered. The former practice act of 1869 (Stats. 1869, p. 248), sec. 330, provides that an appeal may be taken from an order "granting or dissolving an injunction and from an order refusing to grant or dissolve an injunction." The act approved January 26, 1865, sec. 6 (Rev. Laws, 4833), "concerning the courts of justice of this state and judicial officers," gives the supreme court jurisdiction of an appeal from an order "granting or refusing to grant an injunction or *mandamus* in a case provided for by law." *Held*, that section 387 did not impliedly repeal section 6 authorizing an appeal from an order granting an injunction, so that an appeal lies from such order.

2. STATUTES—IMPLIED REPEAL.

Repeals by implication are not favored.

3. APPEAL AND ERROR—REPEAL—IMPLICATION.

It cannot be said that section 387 of the practice act (Rev. Laws, 5329) was intended to cover the whole subject as to appeals so as to make it operate to repeal all other statutes on the subject, including section 6 of the act of 1865 (Rev. Laws, 4833); Rev. Laws, 4564, 6089, 6112 and 6133, providing for appeals from certain other orders.

4. STATUTES—CONSTRUCTION—LEGISLATIVE INTENT.

The legislative intent in enacting statutes must control, and rules of construction are but aids in ascertaining such intent.

5. APPEAL AND ERROR—INJUNCTION—STAY BOND.

On appeal from a mandatory injunction requiring defendant to release water from its reservoir and permit it to flow down the stream so that plaintiff could use it, defendant was entitled, as a matter of right, to a stay of proceedings upon the injunction upon the filing of a proper stay bond.

ORIGINAL PROCEEDING in *mandamus* by the State, on the relation of the Pacific Reclamation Company and

another, against Edward A. Ducker, as Judge of the Sixth Judicial District Court. Writ authorized to issue on application for stay bond.

The facts sufficiently appear in the opinion.

Platt & Gibbons and *Geo. S. Brown*, for Relators:

The question to be decided is whether or not the amendments of 1911 to the practice act (Rev. Laws, 5329) have repealed the act of 1865 (Rev. Laws, sec. 4833). If those amendments have not worked such a repeal, the relators have as a statutory right an appeal from the order granting the preliminary injunction. The act of 1865 is nowhere expressly repealed. It is not a part of the practice act, but an independent act referring by its title to the subject of other than questions of practice. It is evident that it was the object of the practice act, as it plainly states, to define and prescribe the method of taking appeals. This position is not in any way affected by the reason that the practice act defines certain orders which are appealable. The court must necessarily hold all orders mentioned in the practice act as appealable, as conferring jurisdiction of this court to hear such appeals, since it cannot convict the legislature of such an absurdity as granting a right of appeal without at the same time granting jurisdiction to hear such appeal. The grant of the right of appeal is at the same time a grant of jurisdiction to hear the same. There is no statutory or constitutional provision which prohibits the legislature from granting a right of appeal in two different laws. Every lawyer knows that all the rights of appeal are not enumerated in the practice act.

It would seem to be a reasonable interpretation of the action of the legislature of 1911 that, seeing upon the statute books two acts providing for precisely the same thing—to wit, an appeal from an order granting an injunction—they struck out one of these provisions as being superfluous, with the intent that the other provisions should continue to be the law.

Argument for Respondent

We refer the court to the case of *Peters v. Jones*, 26 Nev. 259. The majority of the court there decided contrary to our contention, but if the court is to decide this question upon reason and upon the principles of law, we submit the authorities cited by Judge Fitzgerald as absolutely conclusive in favor of the position taken by us.

As to relator's right to a stay pending appeal, if they have an appeal, in our mind the question is too plain to admit of argument.

Water being real estate and the order appealed from directing the delivery of possession of real property, the case is within the very words of section 5351 of the Revised Laws, and it has been held by the Supreme Court of Utah, where the statute is similar to the Nevada statute, that this section applies to cases like the present. (*Elliot v. Whitmore*, 37 Pac. 459.)

Cheney, Downer, Price & Hawkins, for Respondent:

No appeal lies from the order granting the injunction *pendente lite*—and this court is without jurisdiction.

The right of appeal is purely statutory; did not exist at common law, and unless authorized by statute does not exist. (*State v. Langan*, 29 Nev. 459; *Kapp v. Kapp*, 31 Nev. 70.)

It is a well-established principle that no one has a vested right to an appeal or to any particular form of remedy. That procedure may be changed by the legislature at will, cannot be questioned. That the legislature, in enacting the new practice act, took away the right of appeal from an order granting an injunction, is clear.

Whether an appeal lies or not, is determined by section 387 of the practice act (Rev. Laws, 5329), and not by the act of 1865 (Rev. Laws, 4828, 4833). (*Table Mountain M. Co. v. Waller's Defeat Co.*, 4 Nev. 218; *Keyser v. Saylor*, 4 Nev. 435; *Williams v. Keller*, 6 Nev. 477; *Meadow Valley M. Co. v. Dodds*, 6 Nev. 261; *Kehoe v. Blethen*, 10 Nev. 445.)

In *State v. Shaw*, 21 Nev. 222, this court, in deciding whether an order changing the place of trial was appealable, decided that it was not; but that the question was

properly brought before the court upon an appeal from the judgment. If the act of 1865 is an act creating or defining the right of appeal, or orders from which appeal may be taken, then this decision was error.

Peters v. Jones, 26 Nev. 259, was an appeal taken from orders changing the place of trial. The appeal was dismissed. The court, by Belknap, J., said: "Section 3425 enumerates the judgments and orders from which an appeal may be taken." See, also, *State v. Langan*, 29 Nev. 459; *Kapp v. Kapp*, 31 Nev. 70; *Lake v. King*, 16 Nev. 215; *Gulf C. & S. F. Ry. Co. v. Fort Worth and N. O. Ry. Co.*, 3 S. W. 564.

Where the legislature revises the statutes of the state, after a particular statute has been construed without changing that statute, the presumption is that the legislature intends that the same construction should be continued on that statute.

Prior to the passage of the act of 1865 we had no statute defining jurisdiction and no statute defining state courts. It is perfectly clear that the act referred to was enacted for the purpose of meeting conditions existing after Nevada was admitted as a state.

That the right to the injunction, as granted in this case, is not of the class of mandatory injunctions, which may be stayed when an appeal lies from the granting of the injunction, is clearly shown in the following cases: *Hulbert v. Cement Co.*, 118 Pac. 928; *Cole Silver M. Co. v. Virginia Water Co.*, 6 Fed. Cas. 72; 1 Sawy. 658; 7 Morr. Min. Rep. 516; *Rogers v. Erie Ry. Co.*, 20 N. J. Eq. 379; *Greenbay & M. Canal Co. v. Norrie*, 120 Fed. 986; *Broome v. N. Y. and N. J. Tel. Co.*, 7 Atl. 851; *Murdock's Case*, 21 Am. Dec. 391, 392; *Toledo R. R. Co. v. Philadelphia Co.*, 54 Fed. 741; *Pokegama Lumber Co. v. Klamath Lumber Co.*, 86 Fed. 528.

By the Court, NORCROSS, J.:

This is an original proceeding in *mandamus* to require the respondent to fix the amount of an undertaking to stay the execution, operation, and effect of an order

granting an injunction *pendente lite* in an action which involves the right to certain of the waters of Humboldt River, instituted by the Union Canal Ditch Company and others against the above-named relators, pending an appeal from such order. The motion of the defendants below, relators herein, for an order fixing the amount of a stay bond pending the appeal was denied "upon the grounds that a proper case does not appear requiring the fixing of a stay bond, and that no appeal lies from the order of the court granting a temporary injunction."

Two questions are presented in this proceeding:

(1) Does an appeal lie from an order granting an injunction?

(2) Was the refusing of a stay bond pending an appeal from the order a matter within the discretion of the trial judge?

[1] Section 387 of the practice act, which went into effect January 1, 1912 (Rev. Laws, 5329), provides: "An appeal may be taken: (1) * * * (2) From an order granting or refusing a new trial, or refusing to grant or dissolve an injunction, or appointing or refusing to appoint a receiver, or dissolving or refusing to dissolve an attachment, or changing or refusing to change the place of trial, and from any special order made after final judgment, within sixty days after the order is made and entered in the minutes of the court. (3) * * *"

Section 330 of the former practice act adopted in 1869 (Stats. 1869, p. 248), provided that: "An appeal may be taken: * * * From an order granting or refusing a new trial, from an order granting or dissolving an injunction, and from an order refusing to grant or dissolve an injunction. * * *"

Section 6 of "An act concerning courts of justice of this state, and judicial officers," approved January 26, 1865 (Rev. Laws, 4833), provides: "The supreme court shall have jurisdiction to review upon appeal: First, a judgment in an action or proceeding, commenced in a district court, when the matter in dispute is embraced

in the general jurisdiction of the supreme court, and to review upon appeal from such judgment any intermediate order or decision involving the merits and necessarily affecting the judgment; second, an order granting or refusing a new trial in such cases; an order granting or refusing to change the place of trial of an action or proceeding after motion is made therefor in the cases in which that court has appellate jurisdiction, and from an order granting or refusing to grant an injunction or *mandamus* in the cases provided for by law."

It is the contention of counsel for respondent that, as no provision is contained in section 387, *supra*, of the present practice act authorizing an appeal from an order granting an injunction, no appeal lies therefrom. It is the contention of counsel for relators that the right of appeal exists under the provisions of section 4833, Rev. Laws, *supra*. The original practice act, adopted by the territorial legislature in 1861, provided for an appeal from an order "refusing to change the place of trial." (Stats. 1861, pp. 361, 363, secs. 274, 285.) The statute of 1865, relative to courts of justice and judicial officers, referred to, *supra*, was adopted at the first legislative session following the organization of the state government. This act was designed largely to meet the situation occasioned by the changes made in the courts by the constitution. The practice act of 1861 remained in force after the state organization and until specifically repealed by the practice act of 1869, which in turn was specifically repealed by the practice act of 1912. The practice act of 1869 (section 330) did not contain a provision for an appeal from an order changing or refusing to change the place of trial. Both the practice acts of 1861 and 1869 contained provisions for an appeal "from an order granting or dissolving an injunction, and from an order refusing to grant or dissolve an injunction."

With these preliminary observations we come to a consideration of the decisions of this court in the cases of *Peters v. Jones*, 26 Nev. 259, and *State v. Shaw*, 21 Nev. 222. The Shaw case came up on appeal from a

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final judgment, and the question there presented was whether an order changing the place of trial was reviewable otherwise than on direct appeal. The court said: "The respondent objects to the consideration of the order changing the place of trial from Nye County to Eureka County upon the ground that such an order can only be reviewed upon a direct appeal therefrom. Under our present practice act, however, such an order is not appealable. (Gen. Stats. 3352.) It is properly brought before the court upon an appeal from the judgment, under section 3360, as an intermediate order involving the merits and necessarily affecting the judgment. When *Table Mountain G. & S. M. Co. v. Waller's Defeat S. M. Co.*, 4 Nev. 218, 97 Am. Dec. 526, was decided, the statute made such orders appealable. The objection is therefore untenable."

Neither in the opinion nor in the briefs of counsel is to be found any reference to section 6 of the act of 1865, quoted *supra*.

In the Peters case the court said: "This is an appeal from an order changing the place of trial of this action. Under our former practice act, as amended in 1865 (Stats. 1865, p. 111), an order granting or refusing to change the place of trial of an action or proceeding was appealable to this court. (Section 2513, Comp. Laws; *Table Mountain G. & S. M. Co. v. Waller's Defeat S. M. Co.*, 4 Nev. 218, 97 Am. Dec. 526.) When the present practice act was adopted in 1869, it was provided in the first section of title 9, upon the subject of appeals in civil actions, that 'a judgment or order in a civil action, except when expressly made final by this act, may be reviewed as prescribed by this title and not otherwise.' (Section 3422, Comp. Laws.) Section 3425 enumerates the judgments and orders from which an appeal may be taken. They are: * * * The above provisions omit the provision contained in the prior law that an appeal may be taken from an order granting or refusing to change the place of trial. Such orders, therefore, are

not appealable by the terms of the statute. This was the ruling in the case of *State v. Shaw*, 21 Nev. 222. A contrary ruling was made in the case of *Elam v. Griffin*, 19 Nev. 442. In that case the attention of the court was not directed to the change that had been made in the statute."

If the court in the latter case did not fall into error in assuming that section 6 of the act of 1865, concerning courts and judicial officers, was an amendment of the practice act of 1861, then the conclusions reached in that case might be controlling under the facts presented in this case. We are, however, unable to find any reason or authority for assuming that the said section 6 was an amendment of the then existing practice act. The constitution (Rev. Laws, 275) points out how a section of a statute may be amended, and it will not be contended that such method was followed. Fitzgerald, J., pointed out in his dissenting opinion that section 6 of the act of 1865 was not an amendment of the practice act, and no answer to his contention is to be found in the prevailing opinions which simply assumed that the act of 1861 was amended by the act of 1865.

The act of 1865, concerning courts and judicial officers, was a comprehensive act containing sixty-five sections specially devoted to the subject of the power and jurisdiction of the various courts and the duties and functions of judicial officers. It was an act *in pari materia* with the civil and criminal practice acts, the act in relation to estates of deceased persons and other acts having to do with the powers and procedure of courts. All its provisions were and are subject to the well-settled rules for the construction of acts *in pari materia*. The act of 1865 has never been specifically repealed in whole or in part. If any of its provisions are not now in force, it is because they have been repealed by implication.

[2] That repeals by implication are not favored is a rule of construction that this court has had repeated occasion to apply. (*Thorpe v. Schooling*, 7 Nev. 17; *Estate*

of *Walley*, 11 Nev. 260; *State v. Donnelly*, 20 Nev. 214; *State v. LaGrave*, 23 Nev. 373.)

In *State v. LaGrave*, *supra*, this court said: "The rule that courts are bound to uphold the prior law if it and a subsequent one may subsist together, or if it be possible to reconcile the two together, is well settled. (*McCool v. Smith*, 1 Black, 470, 17 L. Ed. 218; Endlich on the Interpretation of Statutes, sec. 210; see the numerous authorities cited by note 1.) Unless the latter statute is manifestly inconsistent with and repugnant to the former, both remain in force. (*Industrial School Dist. v. Whitehead*, 13 N. J. Eq. 290, and cases cited.) A general statute without negative words will not repeal the particular provisions of a former one unless the two acts are irreconcilably inconsistent. (*State, ex rel. Dunkel, v. Beard*, 21 Nev. 218.) The repeal, total or partial, of statutes by implication is not favored. As to this rule there can be no difference of opinion, and further authorities need not be cited."

In *Thorpe v. Schooling*, *supra*, it was said: "True repeals by implication are not favored; and if it not be perfectly manifest, either by irreconcilable repugnancy or by some other means equally indicating the legislative intention to abrogate a former law, both must be maintained. The intention, if perfectly clear, however, must control, however it may be expressed or manifested. It is upon this principle, evidently, that it is held that a statute revising the whole subject-matter of a former law repeals it."

Between section 6 of the judiciary act of 1865 and section 387 of the practice act of 1912, in so far as appeals from orders affecting injunctions are concerned, there is no repugnancy. The section first mentioned provides: "The supreme court shall have jurisdiction to review upon appeal: * * * An order granting or refusing to grant an injunction or *mandamus* in the case provided for by law." The last-mentioned section provides: "An appeal may be taken: * * * From an order * * * refusing to grant or dissolve an injunction * * * within sixty days after the order is made

and entered in the minutes of the court." Each section refers to a separate and distinct class of orders affecting injunctions, and each section covers what the other omits. Together they give a right of appeal in all those cases which the law of this state has given continuously since the organization of the territorial government more than a half century ago. There being no repugnancy between the two sections, a repeal by implication cannot be said to have been effected for that reason.

[3] Nor can it be said that the legislature, in section 387 of the practice act, intended to cover the whole subject-matter of the cases in which an appeal would lie to the supreme court. The act in relation to estates of deceased persons and other acts contain provisions for appeals from certain orders that have never been attempted to be covered by provisions in the practice act. (Rev. Laws, 4564, 6089, 6112, 6133.)

If section 387 of the practice act had omitted entirely all specific reference to appeals from orders affecting injunctions, a situation would be presented upon the facts similar to that presented in the *Peters v. Jones* case, and it might with greater reason be said that the total omission of the subject-matter was indicative of a legislative intent to take away a theretofore existing right. We do not wish to be understood as holding that this circumstance alone would be sufficient to accomplish a repeal by implication of another existing statute covering the subject-matter omitted. Other independent considerations might be potent in determining the legislative intent.

[4] When the legislative intent can be ascertained, that must govern, and all rules of construction are but mere aids in the ascertainment of such intent. An examination of the provisions of subdivision 2 of section 387 discloses that in every case where there is an appeal allowed from a specific character of order, with the single exception of orders affecting injunctions, the appeal is given both from the affirmative and negative action of the trial

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court, to wit, granting or refusing a new trial; appointing or refusing to appoint a receiver; dissolving or refusing to dissolve an attachment; changing or refusing to change place of trial. Thus we think the section shows on its face evidence of the omission, through accident or inadvertence, of provisions which appeared in corresponding sections of former practice acts. The section heading to section 387 was incorporated in the act as adopted. It reads: "Time within which an appeal may be taken." In arriving at the intention of the legislature in doubtful matters, reference may be had to titles of chapters and headings of sections. There is nothing in this heading to suggest that the section was intended to cover all matters in which an appeal would lie. If we may not indulge a consideration that there may have been an omission of an important provision through accident or inadvertence in the adoption of a statute containing nearly nine hundred sections, nevertheless we find nothing in the statute itself that would warrant this court in finding a manifest intent to repeal by implication the positive provisions of an existing statute. Holding that the provisions in question of section 6 of the act of 1865 are not repealed by an omission of the same provisions from section 387 of the act of 1912 is a very different proposition from construing into the latter section the omitted words.

In *Chicago Railway Co. v. United States*, 127 U. S. 409, 8 Sup. Ct. 1196, 32 L. Ed. 180, Mr. Justice Fields says: "When there are two acts or provisions of law relating to the same subject, effect is to be given to both, if that be practicable. If the two are repugnant, the latter will operate as a repeal of the former to the extent of the repugnancy. But the second act will not operate as such repeal merely because it may repeat some of the provisions of the first one and omit others, or add new provisions. In such cases the later act will operate as a repeal only where it plainly appears that it was intended as a substitute for the first act. As Mr. Justice Story says, it 'may be merely affirmative, or cumulative, or

auxiliary.' (*Wood v. United States*, 16 Pet. 342-363, 10 L. Ed. 987.)"

In *Rosencrans v. United States*, 165 U. S. 257, 262, 17 Sup. Ct. 302, 304, 41 L. Ed. 708, the court, by Mr. Justice Brewer, said: "When there are statutes clearly defining the jurisdiction of the courts, the force and effect of such provisions should not be disturbed by a mere implication flowing from subsequent legislation. In other words, where Congress has expressly legislated in respect to a given matter, that express legislation must control, in the absence of subsequent legislation equally express, and is not overthrown by any more inferences or implications to be found in such subsequent legislation. Especially is this rule to control when it appears that Congress in some cases has made express provisions for effecting a change. This does not conflict with the doctrine stated in *Re Bonner*, 151 U. S. 242, 256, 14 Sup. Ct. 323, 325, 38 L. Ed. 149, that the jurisdiction of a court in criminal cases cannot 'be enlarged by any mere inferences from the law or doubtful construction of its terms.' It is rather the converse of that, for the effort is to destroy a jurisdiction otherwise clearly existing, by mere inferences and doubtful construction."

See, also, *Carpenter v. Russell*, 13 Okl. 277, 73 Pac. 930.

When the Table Mountain case, 4 Nev. 218, 97 Am. Dec. 526, cited in the Peters case, was decided, both the practice act of 1861 and the judiciary act of 1865 provided for appeals from orders refusing to change the place of trial. Hence that case could throw no light on the question under consideration.

We think the words, "in the case provided for by law," concluding section 6 of the act of 1865, refer to those provisions of the practice act relative to the granting or dissolving of injunctions, and not to the section of the practice act enumerating certain judgments or orders as appealable, as contended by counsel for respondent. Counsel have referred to a number of cases decided by this court containing expressions to the effect that the

right of appeal was to be determined by reference to the section of the practice act enumerating instances in which an appeal would lie. Such expressions do not amount to a holding that no other provisions of statutes exist authorizing appeals, for no such question was before the court in those cases calling for such a decision.

The act of 1865, "An act concerning the courts of justice of this state, and judicial officers" (Rev. Laws, 4828-4885), was adopted, with some modifications, from a statute having the identical title, enacted by the legislature of California and approved April 20, 1863. (Stats. Cal. 1863, p. 333.) Section 6 of our act of 1865 corresponds to the same numbered section in the act of 1863 of the California statute. The California statute of 1863 does not appear to have ever been specifically repealed, but, when the code of civil procedure was adopted by that state in 1872, the general subject-matter of the judiciary act of 1863 appears to have been incorporated in the code of civil procedure. Section 6 of the judiciary act was omitted from the revision, but section 5, with some modifications, was included and appears as section 52 of the code of procedure act. A number of decisions of the Supreme Court of California refer to section 52 as conferring jurisdiction on that court in matters of appeal. (*Morton v. Broderick*, 118 Cal. 474, 50 Pac. 644; *People v. Bank*, 152 Cal. 261, 92 Pac. 481.) This court in *Goldfield M. M. Co. v. Frances-Mohawk M. & L. Co.*, 33 Nev. 491, 504, recognized section 6 of the act of 1865 as an existing provision of law. We think there are sufficient weighty and conclusive reasons for holding that the provisions of section 6 of the act of 1865, allowing a right of appeal from an order granting an injunction, have not been repealed, and that such right exists.

[5] Defendants, relators herein, having the right of an appeal from an order granting an injunction *pendente lite*, was it the duty of the court, upon application, to fix a bond staying execution of the injunction pending appeal? It appears that the Pacific Reclamation Company had constructed on the head waters of the

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Humboldt River and certain of its tributaries a large reservoir for the storing of waters of said river and its tributaries, and it is alleged that the cost of this reservoir was about \$140,000; that at the time of the issuance of the injunction several thousand acre-feet of water were stored in this reservoir. In addition to prohibiting the defendants from storing, impounding, diverting, or using these waters, the injunction commanded that the "Pacific Reclamation Company, its agents, servants, and employees are commanded and ordered to remove from said Humboldt River, and from said Bishop Creek, and from said Burnt Creek, and from said Trout Creek, or either of them, the obstruction or obstructions therein placed by said defendant, Pacific Reclamation Company, so as to permit the waters thereof hereintofore impounded or stored in said storage reservoir as in the complaint alleged, to flow out, into and down the channel of said Bishop, Burnt, and Trout Creeks, or either of them, and said Humboldt River, as and in the manner said water or waters of said streams were wont or accustomed to flow, prior to the placing or erection of obstructions therein, in the complaint herein referred to, by the defendants or either of them, pending the final hearing of the above-entitled action, and until the further order of this court."

This is a mandatory injunction as distinguished from a mere prohibitive injunction. It requires the delivery of water in the possession and under the control of defendants to plaintiffs. On an appeal from a mandatory injunction requiring defendants to deliver property to plaintiffs, as in this case, an appeal from the order entitles the defendants, as a matter of right, upon the filing of a proper stay bond, to a stay of proceedings under the injunction. In such a case, the fixing of the amount of a stay bond is not a matter of discretion with the trial court. (*Mining Co. v. Fremont*, 7 Cal. 130; *Bliss v. Superior Court*, 62 Cal. 543; *Dewey v. Court*, 81 Cal. 64, 22 Pac. 333; *Schwartz v. Court*, 111 Cal. 106, 43 Pac. 580; *Foster v. Court*, 115 Cal. 279, 47 Pac. 58;

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Nark v. Court, 129 Cal. 1, 61 Pac. 436; *Elliot v. Whitmore*, 10 Utah, 238, 37 Pac. 459; Rev. Laws, 5351.)

The identical question, under a similar state of facts as here presented, was considered by the Utah court in *Elliot v. Whitmore*, *supra*, and it was there held to be the duty of the court below to fix the amount of a *superseas* bond pending appeal. See, also, *State v. Superior Court*, 39 Wash. 115, 80 Pac. 1108, 1 L. R. A. (N. S.) 554, 109 Am. St. Rep. 862, and note to latter case as reported in 4 Ann. Cas. 232; *State v. Superior Court*, 28 Wash. 403, 68 Pac. 865; *State v. Superior Court*, 43 Wash. 225, 86 Pac. 632; *Home Fire Insurance Co. v. Dutcher*, 48 Neb. 755, 67 N. W. 767.

Petitioners are entitled to the peremptory writ in this case, but as the trial court assumed, because of former decisions of this court, that no appeal would lie from an order granting an injunction, we think the issuance of the writ should be stayed until such time as another application can be made to the court to fix the amount of a stay bond and until the further order of this court.

It is so ordered.

Points decided

[No. 1975]

THE LAS VEGAS AND TONOPAH RAILROAD COMPANY (A CORPORATION), RESPONDENT, v. W. G. SUMMERFIELD, W. S. JOHNSON, AND C. E. DEANOR, APPELLANTS; E. S. JOHNSON AND BAND GOLDFIELD MINING COMPANY (A CORPORATION), INTERVENERS, RESPONDENTS.

1. EMINENT DOMAIN—PARTIES—INTERVENTION.

Persons claiming interest in land sought to be condemned. and for that reason claiming an interest in the award made. were expressly authorized to intervene by Stats. 1907, c. 128. sec. 8, providing that all persons in occupation of or having or claiming an interest in any of the property described in the complaint, or in the damages for the taking thereof. though not named, may appear, plead, and defend. each in respect to his own property or interest or that claimed by him. in like manner as if named in the complaint.

2. MINES AND MINERALS—PATENT—RELATION.

A patent to a mining claim relates back to the original location.

3. MINES AND MINERALS—CONVEYANCE OF SURFACE—RIGHTS OF GRANTEE—EQUITY.

Grantees of a portion of the surface of a mining claim under mesne conveyances from the original locator are entitled to possession of the surface so conveyed, under the rule that equity will control the patent title in favor of party holding the equitable title.

4. MINES AND MINERALS—CONVEYANCE OF SURFACE—DESCRIPTION.

Reference to a mining claim as a placer instead of a lode claim, in an agreement for the sale of a portion of the surface. was immaterial where the property was otherwise so described as to leave no doubt as to what was intended.

5. EMINENT DOMAIN—RIGHT TO AWARD—OWNER OF MINING LOCATION.

The owner of a valid, subsisting, but unpatented, lode mining claim, is entitled to an award for condemnation of a portion of the surface for a railroad right of way.

6. ADVERSE POSSESSION.

Facts of case considered in reference to title by adverse possession of portion of an unpatented mining claim, majority of court deeming same insufficient.

APPEAL from the Seventh Judicial District Court, Esmeralda County; *Peter J. Somers*, Judge.

Condemnation proceedings by Las Vegas and Tonopah Railroad Company against W. G. Summerfield and W.

Argument for Appellants

S. Johnson, doing business as Summerfield & Johnson, and another, in which E. S. Johnson and the Band Goldfield Mining Company intervene. From a judgment distributing an award of damages, W. G. Summerfield and W. S. Johnson appeal. Judgment **affirmed** in so far as it made an award in favor of the Band Goldfield Mining Company, and **reversed** as to intervener E. S. Johnson, with direction to enter judgment in favor of appellants in the sum of \$657.

The facts sufficiently appear in the opinion.

J. F. Dennis and Walter Shelton, for Appellants:

The court had no jurisdiction over the petitions to pro rate, and the issues made thereunder, for the reason that the statutes do not confer such jurisdiction. It appears from the findings of fact that no unknown owners were made defendants; that the petitioners were not made defendants, and that no notice, either actual or constructive, was filed or served upon petitioners. It therefore follows that this proceeding was ineffectual to vest the title of petitioners in the railroad company. And if it could not disturb their alleged title, certainly no damage to them would follow. (*Charleston Ry. Co. v. Hughes*, 70 Am. St. Rep. 17; *Phillips v. Postal Telegraph Co.*, 41 S. E. 1023, 89 Am. St. Rep. 868.)

Section 20 of the eminent domain act provides that "the court may order the money to be apportioned among the defendants, according to the rights of the several parties, as shown by the proofs," etc. In this section it is expressly stated that the court may order the money, which of course is the money paid in under the award, to be apportioned among the defendants according to the rights of the several parties as shown by the proofs. No provision is made in the section last referred to except for such parties as are made defendants to the original action.

In view of the fact that it was within the power of the plaintiff railroad company to make defendants of all parties who might claim an interest in the tract of land

Argument for Appellants

in controversy; and in view of the further fact that the defendants Summerfield & Johnson were the only persons made parties defendant, it follows as a legal result that the plaintiff railroad company decided at its own risk that defendants Summerfield & Johnson were the owners of said property, and by these proceedings acquired only such title as they possessed, and have elected to pay into court, in accordance with said award, the sum of one thousand dollars as compensation for such title as the plaintiff railroad company did acquire through defendants Summerfield & Johnson by reason of said condemnation proceedings, and that any title that might have been the subject of controversy in reference to said award, had the parties asserting the same been made defendants to the original proceedings for condemnation, is now, if it exists at all, wholly and only the subject of an action between the party plaintiff to such condemnation proceeding and the party asserting such title, and cannot in any way affect the award obtained in the original condemnation proceedings, for the reason that the party now asserting such title was not a party defendant to the original controversy. There is absolutely nothing in the statute which would permit a stranger who has lost no right, and who has no interest in the proceedings, to come into court, after the trouble and expense of litigation has been borne by another, and claim the fruits thereof. The injustice of such a proceeding is manifest.

Our position is further strengthened by the fact that section 29 makes the civil practice act applicable, but that such practice does not permit any intervention in a case of this kind, or in any other case of a civil nature, after judgment is rendered, without setting aside the judgment or verdict, as the case may be, and opening up the case for a rehearing.

It is nowhere asserted by the petitioners herein that they were damaged in any way by the plaintiff railroad company, and no attempt whatever has been made upon the part of petitioners to prove any damage to its alleged lands or premises. No proof of damage having been

Argument for Respondents

made, none can be awarded, for the court cannot say that, because Summerfield & Johnson were awarded one thousand dollars, petitioners are entitled to it because the court found they owned the land.

Neither of the mining claims on which respondents base their title to the land in question were patented at the time of the commencement of this action. Consequently neither of respondents had a cause of action against the appellants for the possession of the lots of land upon which the feed stable and corral were situated, for the reason that the latter were in possession of the land for more than two years prior to the commencement of this action (15 Cyc. 1007, par. B), and any subsequently acquired title cannot benefit the respondents. (Stats. 1907, p. 285, sec. 16; Ency. Pl. & Pr., vol. 7, pp. 505, 506, par. 2.)

If it is true that respondents own the mining claims embracing the land on which the livery stable of appellants was situated, it is likewise an admitted fact that appellants, under claim of right so to do, had uninterrupted possession of the land in controversy from January 1, 1905, until January 31, 1910, when the respondents filed their petitions to pro rate in this case—a period of over five years—and they were estopped from denying our title. (15 Cyc. 863, and authorities cited.)

C. O. Whittemore, for Respondent Plaintiff:

The plaintiff has deposited in court the amount awarded by the commissioners as the value of the property sought to be condemned, and for the damages which will accrue to the portion not sought to be condemned, by reason of the construction of the proposed improvements. Its only interest now is that the amount so deposited shall go to the parties entitled thereto, *i. e.*, the owners of the property.

D. H. Kehoe, for Intervener E. S. Johnson:

The commissioners in condemnation proceedings have no authority or power other than to fix the value of the

Argument for Respondents

land condemned; a trial is had, and proofs of ownership made before the court, as was done in this case, and the court determines to whom the land taken belongs. The court found in this case that the land did not belong to the appellants Summerfield & Johnson, but did find that it belonged to respondent E. S. Johnson, and thereupon decreed \$657 to him, for the very good reason that he was the legal owner of the land for which the award was made, and therefore entitled to his share of the award.

E. S. Johnson became a party to this action before the trial took place before the court, by filing his petition in intervention, and serving the same on appellants.

Any person shall be entitled to intervene who has an interest in the matter in litigation. (Comp. Laws, 3694.) A third person may intervene either before or after issue has been joined in the cause. (Comp. Laws, 3695.) The intervention must be by petition or complaint filed with the court in which the action is pending. (Comp. Laws, 3696.)

Respondent has fully complied with the sections of the statute cited and with section 20 of the act of 1907.

Section 23 of the act of 1907 provides for the distribution of the award to those entitled thereto, and the court found that E. S. Johnson, petitioner and intervener, was entitled to the sum of \$657 of the award, and so decreed.

The question presented to the trial court in this case was who was the owner of the land described in the complaint, and who was entitled to receive the award made by the commission as the value of the land. The act of 1907 does not vest authority in the commission to decide who is the legal owner of the land condemned, or to decide to whom the award made belongs, and as the only authority vested in the commission is to hear the evidence and on the evidence to find the value of the land condemned, it then becomes the duty of the court, after the report of the commission is returned, to try the case and render its judgment in favor of the party or parties who

prove their title to the land taken, as was done in this case.

Detch & Carney, for Intervener Band Goldfield Mining Company:

The only attempt on the part of appellants to show ownership of the ground in dispute, is the testimony of Mr. Summerfield that Summerfield & Johnson were in possession of the premises from the 1st day of January, 1905, up to the time of the commencement of condemnation proceedings.

We know of no law, and appellants cite none, which would give to them any legal or equitable ownership of the premises in dispute. Had appellants, at the time they went into possession of these premises, investigated the situation concerning the same they would have ascertained that there was existing at that time a valid and subsisting lode location; they failed to do this and the doctrine of *caveat emptor* applies, and we claim that whatever improvements they placed upon these premises are now the property of the respondent Band Goldfield Mining Company, and that they have absolutely no right to any portion of the award made by the commissioners in the proceedings brought to condemn these premises.

The record of the condemnation proceeding shows that the land in controversy was damaged, and being the record owners of said land, the presumption naturally follows that they were in the occupancy of same. At any rate, appellants, being trespassers, are not in a position to dispute our title.

By the Court, NORCROSS, J., dissenting in part:

This is a proceeding brought by the plaintiff under the provisions of "An act to regulate the exercise of the right of eminent domain" (Stats. 1907, p. 279) to condemn a right of way for its railroad across a certain tract of land in the town of Columbia, Esmeralda County, occupied and used by the defendants as a feed corral in

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connection with what was known as the branch Pioneer Livery Stable. As provided by the act, commissioners were appointed to assess the damages, and the commission rendered a report awarding the defendant C. E. Deanor the sum of \$1,000, and Summerfield & Johnson \$500. C. E. Deanor, who was the lessee of Summerfield & Johnson of the stable and corral, accepted the award in his favor which was paid by plaintiff. Summerfield & Johnson objected to the award made to them, and there was a further submission of the question of their damages and a subsequent award of \$1,000 to them, provided that they establish their title to said property.

The plaintiff paid into court the sum of \$1,000 subject to the provisions of the award. Subsequent to the award last mentioned, and on January 31 and March 4, 1910, respectively, the Band Goldfield Mining Company and E. S. Johnson severally intervened, and alleged ownership, respectively, of the Yellow Rose quartz mining claim and the Sleepy Hollow mining claim, upon which claims the right of way sought to be condemned in the action was located, and prayed that the entire award be decreed to them in proportion to the area of their respective claims affected. The defendants Summerfield & Johnson objected to the jurisdiction of the court to entertain the petitions in intervention, which objection was overruled. They also filed answers to the petitions denying ownership in petitioners, alleging ownership in themselves by purchase from their grantors and predecessors in interest, and also setting up a right of possession under the statute of limitations. Prior to the trial of the issues between defendants and interveners, and on the 23d day of April, 1910, a stipulation was entered in the minutes of the court between the plaintiff, defendants, and interveners "that the report of the commissioners be confirmed, and that the different claimants to the fund of \$1,000 may continue the litigation as to ownership of said fund or any part of it without holding the Las Vegas and Tonopah Railroad

Company responsible for any more or further sum than the said \$1,000 or further costs." The court found the interveners to be the owners of the property for which the award in damages was made, and rendered several judgments in favor of the said E. S. Johnson in the sum of \$657, and the said Band Goldfield Mining Company in the sum of \$343.

From the judgments and from orders denying motions for a new trial defendants have appealed.

[1] The contention that the trial court was without jurisdiction to permit the interventions is, we think, without merit. Section 8 of said act of 1907, *supra*, provides: "All persons in occupation of, or having or claiming an interest in, any of the property described in the complaint, or in the damages for the taking thereof, though not named, may appear, plead, and defend, each in respect to his own property or interest, or that claimed by him, in like manner as if named in the complaint." This section clearly authorizes any person interested either in the property or the award to intervene and assert his rights. Whether such an intervention ought to be permitted at a time subsequent to the award by the commissioners by a party not named in the complaint, and whose rights would not, therefore, be affected by the award and judgment, we need not now consider. Permission at such a time might be erroneous, but, if error at all, it is an error within, and not in excess of, jurisdiction. However that may be, the stipulation entered in the minutes of the court and quoted *supra* we think amounts to a waiver of any objection that may have been otherwise well taken.

Upon the merits, we think the court erred in determining that the defendants were not entitled to any portion whatever of the award, and in rendering judgment in favor of interveners for the total amount thereof. The interveners neither alleged or proved any damages to themselves other than might be held to follow from a bare allegation and proof of ownership of the two mining claims in question. Doubtless the main element

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of damage considered by the commissioners was the injury to the corral and stable owned by the defendants, the lessee of whom was deemed to have been damaged to the extent of \$1,000 for the injury to his business. The said lessee was paying defendants \$85 per month rental.

The defendants and the intervener, E. S. Johnson, assert title from the same original source as shown by the following: June 3, 1903, W. H. Harris located the Wild Cat quartz lode claim, the certificate of location of which was recorded in Book J, p. 171, Records of Esmeralda County. October 19, 1903, W. H. Harris located the Yellow Rose claim. April 20, 1904, W. H. Harris entered into the following agreement with W. A. Marsh and E. C. Courtney: "That the party of the first part (W. H. Harris) in consideration of the sum of \$100, United States gold coin, paid to him, hereby agree that the party of the second part, may occupy and use the surface of a certain tract of land situated on the north side of Columbia townsite and known as the corral situated on the Yellow Rose Placer claim. Said tract of land is (184) feet fronting on Main Street, in the town of Columbia, and (200) feet deep toward Columbia Mountain. And further agree to give the said second party, a deed to such ground, so soon as he obtains patent to the mining claim on which said tract is situated." July 11, 1904, W. A. Marsh and E. C. Courtney executed a quitclaim deed to W. J. Sinclair of property described as follows: "One corral situated in the town of Columbia on the Yellow Rose placer claim, said tract of ground is 184 feet fronting on Main Street, and 200 feet deep toward Columbia Mountain." December 31, 1904, W. J. Sinclair and wife executed a quitclaim deed to defendants Summerfield and Johnson of property described as follows: "Fronting 184 feet on Main Street, 200 feet deep from the north side of said street, commonly known and designated as the branch Pioneer Livery Stable." June 24, 1904, W. H. Harris deeded to John E. Lutz certain mining premises described as "'Wild Cat' placer mining claim, the location certificate of which is duly of

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record in the office of the county recorder at Book J, p. 171, especially reserving and excepting from this conveyance the surface rights only of a strip of land 184 feet in length, more or less, and 175 feet in width, more or less, along the southerly end of the said 'Wild Cat' placer, which has heretofore been leased by the grantor herein to William A. Marsh and E. C. Courtney for a corral, and which is now enclosed by a wire fence. Also all those certain lode mining claims situated in said Goldfield Mining District, known, located and recorded as the 'Granite' and 'Yellow Rose' lode mining claims." February 15, 1905, deed from John E. Lutz to E. S. Johnson of Yellow Rose lode mining claim, also Granite, White Rose, and Pink Rose lode mining claims, containing the following reservation: "Especially reserving herefrom all that portion of the surface rights of the south 800 feet of the said Yellow Rose mining claim, leased or sold by the party of the first part prior to the date hereof; and the party of the first part, for the consideration hereinabove mentioned, does hereby sell, assign and transfer said leases and contracts, together with all covenants, rights and interest of party of first part therein, unto the party of the second part, his heirs or assigns." February 27, 1908, patent of the United States to E. S. Johnson for Yellow Rose lode mining claim.

[2] The patent obtained by intervener E. S. Johnson relates back to the original location of the Yellow Rose claim made by W. H. Harris on October 19, 1903. (Lindley on Mines, 2d ed. sec. 783.)

[3] The defendants, their grantors and predecessors in interest, holding possession of a portion of the surface of the Yellow Rose claim, under mesne conveyances from the original locator, W. H. Harris, are entitled to possession of the portion of the claim in controversy, for "equity will control the patent title in favor of the party holding the equitable title." (Lindley on Mines, 2d ed. sec. 719.)

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[4] The fact that the Yellow Rose claim is described as a placer instead of a lode claim in the agreement between Harris, Marsh, and Courtney of date April 20, 1904, we think is immaterial, for the property is otherwise so described as to leave no doubt as to what was intended. In the conveyance from Harris to Lutz of June 24, 1904, the Wild Cat claim is described also as a placer, although the certificate of location referred to shows it to have been located as a lode claim. We think the intervener, E. S. Johnson, is entitled to no portion of the award.

[5, 6] The right of the Band Goldfield Mining Company to a portion of the award rests upon the fact that at the time of intervention it was the owner of the Sleepy Hollow lode mining claim, an unpatented but valid and subsisting claim located on December 1, 1903, subject to whatever legal rights defendants may be entitled to by reason of the claim of adverse possession. Contrary to my own views of the question, my associates are of the opinion that, as to the Sleepy Hollow mining claim, the defendants have not established an adverse possession, and are not entitled to the amount of the award which the judgment gave to the Band Goldfield Mining Company.

The judgment in favor of the Band Goldfield Mining Company is affirmed.

The judgment in favor of E. S. Johnson is reversed, and the court below is directed to enter judgment in favor of the appellants in the sum of \$657.

It is so ordered.

Statement of Facts

[No. 2015]

W. C. STONE, RESPONDENT, v. M. J. BELL, COUNTY AUDITOR OF ESMERALDA COUNTY, APPELLANT.

1. MANDAMUS—ABATEMENT.

A proceeding in *mandamus* against a county officer does not abate upon the expiration of his term of office; but, the duty being a public one, his successor may be substituted.

2. GRAND JURY—POWERS OF GRAND JURY—PUBLIC OFFICERS—PRESUMPTION.

Rev. Laws, 7028, 7029, respectively, require the grand jury to inquire into the wilful and corrupt misconduct of public officers, and provide that they may examine all public records, while section 1508 imposes on the board of county commissioners the duty of auditing the accounts of all officers. Sections 4148 and 4153 provide for the appointment of a state auditor who shall at the direction of the governor examine the books and accounts of all county officials. *Held* that, there being a presumption that public officers performed the duties required of them by law, the grand jury cannot hire an accountant to examine the books of county officials; it being their duty, in case there is reason to believe that the books of the county should be audited, to request either the board of county commissioners or the governor to provide for such audit.

3. GRAND JURY—POWERS OF JUDGE—PRIVATE ACCOUNTANT.

The grand jury being without statutory authority to hire an accountant to audit the books of county officers, the district judge, though required by Rev. Laws, 4924, to charge grand juries as to their duties, part of which section 7028 provides shall be an inquiry into the wilful and corrupt misconduct of public officers, has no inherent authority to engage a private accountant to examine and audit the books of all county officers; it not appearing that there was any reasonable ground to believe that such officers were guilty of misconduct.

APPEAL from the Seventh Judicial District Court, Esmeralda County; *Peter J. Somers*, Judge.

Mandamus by W. C. Stone against M. J. Bell, as County Auditor of the County of Esmeralda. From a judgment granting a peremptory writ, respondent appeals. **Reversed**, and proceedings ordered dismissed.

STATEMENT OF FACTS

This is an appeal from a judgment granting a peremptory writ of *mandamus* commanding the appellant to issue his warrant on the county treasurer of

Statement of Facts

Esmeralda County in favor of the respondent for the sum of \$602.45. The proceeding was submitted to the court below upon an agreed statement of facts which were adopted by the court, and which are as follows:

"(1) That on February 15, 1908, a grand jury was duly impaneled according to law, and immediately thereupon began to perform the duties imposed upon that body by law.

"(2) That in the course of its business the said grand jury requested the judge of the court, of which it was a part, to authorize it to employ auditors to audit the books of the county of Esmeralda, and in accordance with the said request Hon. Frank P. Langan, then judge of the district court of the First judicial district of the State of Nevada, in and for the county of Esmeralda, made an order authorizing the said grand jury to employ auditors to audit the books of Esmeralda County.

"(3) That in the course of its business the said grand jury, through its foreman, by virtue of said order, entered into a contract with McLaren-Goode & Co., certified accountants of the City and County of San Francisco, State of California, by which the said McLaren-Goode & Co. were employed to audit the books of the county of Esmeralda, at a fixed rate of compensation.

"(4) That the said McLaren-Goode & Co., in accordance with the aforesaid contract, began the work of auditing the books of Esmeralda County on the 10th day of April, A. D. 1908, and that the said work was completed to the satisfaction of the court and grand jury on the 9th day of May, A. D. 1908.

"(5) That the amount due McLaren-Goode & Co. for said work amounted, according to the rate of compensation fixed by said contract, to the sum of \$1,227.45.

"(6) That the bill for the amount due McLaren-Goode & Co., amounting to \$1,227.45, was duly presented to the court, Judge Langan presiding, and, meeting with the approval of the court, the said bill was allowed by Judge Langan and thereupon presented to George Brodigan, the then auditor of the county of Esmeralda, for payment.

Argument for Appellant

"(7) That the said bill, as allowed by Judge Langan, was presented to George Brodigan, auditor of Esmeralda County, for payment. That said George Brodigan thereupon paid to McLaren-Goode & Co., on a peremptory writ, the sum of \$625, after *mandamus* proceedings had been had, but that he has at all times failed and refused to pay the balance of \$602.45, since the same fell due.

"(8) That the said George Brodigan has ceased to be auditor of Esmeralda County, and that M. J. Bell is, at this time, the duly elected and qualified auditor of Esmeralda county. That the said M. J. Bell, as successor in office to George Brodigan, has been duly substituted in his place as defendant in this action, which substitution was and has been made over and against the objection of M. J. Bell.

"(9) That said claim of \$602.45 was, for a valuable consideration, sold and assigned by McLaren-Goode & Co. to Walter C. Stone, and that he, the said Walter C. Stone, is at this time the bona fide owner of said claim.

"(10) That said claim for the sum of \$602.45 of the plaintiff was never presented to the county commissioners of Esmeralda County, and has never been acted upon by the board of county commissioners of Esmeralda County, and has never either been allowed or rejected by said board of county commissioners. That no copy of any order of the board of county commissioners allowing the said claim or demand and authorizing the payment thereof, together with the claim, has ever been submitted to the defendant George Brodigan, as county auditor, or to the substituted defendant, M. J. Bell, the successor of said George Brodigan.

"(11) That demand for the said sum of \$602.45 was duly made upon said M. J. Bell prior to the application for his substitution as defendant in this action, and payment was refused by him."

John F. Kunz, District Attorney, for Appellant:

Mandamus against a public officer abates upon the expiration of his term and the induction of his successor.

Argument for Respondent

(*State v. Board*, 79 Pac. 402; *U. S. v. Boutwell*, 17 Wall. 604, 21 L. Ed. 721; 1 Cyc. 69; 26 Cyc. 424, and authorities cited; *U. S. v. Butterworth*, 42 L. Ed. 873.)

In order for the court to be able to exercise the inherent power contended for, a state of facts must be alleged in the complaint which would justify such action. There are no such allegations. It is presumed that public officers properly perform their official acts. (16 Cyc. 1076, 1078, and authorities cited.) Without allegations of wilful and corrupt conduct on the part of the public officers of Esmeralda County at the time the grand jury employed the accountants to expert and audit the books of the county, a clear legal right to the writ is not stated. (*State v. Noyes*, 25 Nev. 31; *State v. LaGrave*, 22 Nev. 419.)

The duty to audit the county books is by statute given to the board of county commissioners. (Comp. Laws, 2111.) No demand was made upon the commissioners for an audit. Where a duty is prescribed by the legislature and imposed upon an officer or board, there is no inherent power remaining in the court to be exercised in contravention thereof, unless there has been an absolute refusal upon the part of such officer or board to act. (*Mahaffey v. Territory*, 66 Pac. 342; *Meister v. People*, 31 Mich. 98.)

Henry M. Hoyt and B. J. Henley, for Respondent:

An action does not abate with the expiration of the term of office of the defendant where there is a continuing liability and where the successor in office has been substituted as defendant. (*Thompson v. U. S.*, 103 U. S. 480; *Norwalk v. Council*, 42 Atl. 85; *Fox v. Trinidad W. Co.*, 43 Pac. 1052; *People v. Morton*, 50 N. E. 799; *State v. Warner*, 13 N. W. 260; *People v. Ahern*, 93 N. E. 472; *Nance v. People*, 54 Pac. 631; *Utter v. Franklin*, 64 Pac. 427.)

The court had the power to authorize the grand jury to employ auditors to audit the county books by universal and immemorial custom. The power is also given the court by necessary implication by Comp. Laws, 4176. A grand jury is a constituent part or branch of the court

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and is under its general supervision and control. (20 Cyc. 1294.) Every court has certain inherent powers of which it cannot be divested, one of which is the power to procure the necessary equipment and of appointing necessary assistants for the convenient and successful transaction of its business. (*State v. Davis*, 26 Nev. 379, and authorities cited.)

This doctrine is analogous to that which gives a court the power to appoint counsel to assist the district attorney in the prosecution of criminal cases. This doctrine is founded, in the absence of a statute, on the inherent power of the courts. (*Board v. Crump*, 70 Pac. 159; *Raymond v. People*, 30 Pac. 511; *Keys v. State*, 23 N. E. 1097.)

By the Court, NORCROSS, J., after stating the facts as above:

[1] It is the contention of counsel for appellant that the court below erred in allowing the motion of plaintiff to substitute M. J. Bell as respondent in the proceeding after expiration of the term of office of George Brodigan, against whom the proceeding was originally instituted. Counsel contends that the proceeding abated upon the expiration of the term of office of the original respondent, and that it was improper to substitute his successor in office, and a number of cases are cited to support this view. The question is one of original impression in this court, and we see no good reason not to adopt the view that the successor in office in a case of this character may be substituted in place of the officer whose term has expired. Here an official duty is sought to be enforced, one which continues until performed, regardless of who may, for the time being, be the incumbent of the office. To hold that a proceeding of this character abates, simply because there is a change in the person occupying the office, is to impose needless expense and delay upon a litigant seeking to enforce what he deems to be a legal right. If the successor in office sees fit to adopt the course of his predecessor in refusing to perform what is

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alleged to be an official duty, no good reason appears why a new proceeding should of necessity be instituted.

[2, 3] There is no statutory authority for a district judge to enter an order authorizing a grand jury to employ an accountant to audit the books of county officers. It is the contention of counsel for respondent on appeal that the district court had the inherent authority to make the order in question. Our attention has not been called to, nor have we been able to find, an authority directly in point.

By section 211 of the old criminal practice act, which is identical with section 178 of the act now in force (Rev. Laws, 7028), it is provided: "The grand jury must inquire into the case of every person imprisoned in the jail of the county, on a criminal charge, and not indicted; into the condition and management of the public prisons within the county; and into the wilful and corrupt misconduct in office of public officers of every description within the county." The following section of the old and new acts is substantially the same in both, and reads: "The grand jury shall be entitled to free access, at all reasonable times, to all public prisons, and to the examination without charge of all public records within its district." (Rev. Laws, 7029.) By an act approved February 12, 1879 (Rev. Laws, 4924), it is provided: "It shall be and it is hereby made the special duty of all district judges in this state to give in charge to the grand juries, at the commencement of each term of their respective courts the full text of the statutes of this state, in reference to the duties, conduct, responsibilities, and penalties of military, civil, and peace officers in this state."

It is contended by counsel for respondent that "the court had the power to authorize the grand jury to employ auditors to audit the county books by universal and immemorial custom," and further that the power is also given the court "by necessary implication" by the provisions of section 7028, Rev. Laws, *supra*.

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We are not aware of the existence of any such custom, nor have we been able to find mention of the same in authorities or text-writers. There is a legal presumption that public officers perform the duties required of them by law, and, while grand juries are commanded to inquire into "wilful and corrupt misconduct of public officers," such duty is to be performed in the light of such presumption. To perform the ordinary and usual duties of a grand jury does not require the employment by them of an expert accountant.

There are two specific provisions of statute providing for the auditing of the books of county officers. The board of county commissioners are given power "to examine and audit the accounts of all officers, having the care, management, collection, or disbursement of any money belonging to the county or appropriated by law, or otherwise, for its use and benefit." (Rev. Laws, 1508.) The legislature by an act approved March 26, 1907, provided for the appointment by the governor of a state auditor, who "shall be thoroughly versed in the science of bookkeeping and accounts," and whose duty it shall be at the direction of the governor "to examine the books and accounts of all county officials," etc. (Rev. Laws, 4148-4153.) If the grand jury had reason to believe that the county books of Esmeralda County should be audited, it could have requested either the board of county commissioners or the governor to provide for such an audit.

That courts have certain inherent powers, which neither the legislature nor the executive branch of the government can take from them, is beyond question. We do not think, however, that a district court has the inherent power to make an order authorizing the grand jury to audit the county books. That is not a duty imposed upon the grand jury or the court, but is a duty by statute lodged elsewhere.

The case of *State v. Davis*, 26 Nev. 373, and other cases cited by counsel for the respondent, do not, we

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think, warrant a holding that the district court has an inherent power to bind a county by a contract authorized to be entered into by a grand jury for the purposes of auditing the books of the various county officers. All the authorities recognize that the inherent powers of courts have limitations. The case of *Board of Commissioners v. Gwin*, 136 Ind. 562, 36 N. E. 237, 22 L. R. A. 402, is instructive in this regard.

This proceeding does not present a question whether, in the case of an investigation of a charge of malfeasance in office of a public officer, a district court might not, under certain circumstances, be warranted in authorizing the grand jury to employ an expert and to order the payment of the amount of his services. The order in this case was general and comprehensive in character, authorizing the grand jury to enter into a contract with a firm of accountants to audit all the county books. This, we think, was an invasion of the executive branch of the government and in excess of the power of the court.

The judgment is reversed, and the proceedings ordered dismissed.

Opinion of the Court—Sweeney, C. J.

[No. 1778]

JULIA FOSTER, EXECUTRIX, APPELLANT v. DAVID T. JONES, AND MRS. DAVID T. JONES (HIS WIFE),
RESPONDENTS.

1. APPEAL AND ERROR — DISMISSAL — GROUNDS — LACK OF CONTROVERSY.

An appeal will be dismissed upon proof by affidavit that there is no longer a controversy for determination.

APPEAL from the Second Judicial District Court, Washoe County; *John S. Orr*, Judge.

Action by Julia B. Foster, executrix of A. J. Foster, deceased, against David T. Jones and others. From an order sustaining a demurrer and a judgment dismissing the cause, plaintiff appeals. On motion to dismiss appeal. **Appeal dismissed.**

John E. de Golia, Fred B. Hart, and Oscar J. Smith, for Appellant.

Charles Lewers and H. W. Huskey, for Respondents.

By the Court, SWEENEY, C. J.:

This is an appeal from an order of the Second judicial district court of the State of Nevada in and for Washoe County from a certain judgment entered in that court in favor of the respondents dismissing this cause, for the reason that the plaintiff refused to amend after a demurrer had been sustained.

Upon an appeal from said order being perfected to this court, a motion to dismiss said appeal was interposed by the attorneys for respondents upon the ground that the appeal had not been prosecuted with due or any diligence upon the part of said appellant, and upon the further ground that no controversy now remains to be determined by said appeal, and that the defendants David T. Jones and Mrs. David T. Jones, his wife, two of the necessary parties to the action, were dead.

An affidavit stating that there is no controversy to be determined by this appeal having been presented to the court, it is ordered that the appeal be dismissed, subject

to the right of the appellant or legal representative to move to have the appeal reinstated at any time within thirty days after receiving notice that the appeal has been dismissed.

[No. 1847]

TONOPAH AND GOLDFIELD RAILROAD COMPANY (A CORPORATION), RESPONDENT, v. JOHN DOE FELLENBAUM AND P. D. PAYNE, APPELLANTS.

ON REHEARING

Former opinion and judgment as reported in 32 Nev. 278, affirmed. NORCROSS, J., dissenting.

APPEAL from the Seventh Judicial District Court, Esmeralda County; *Theron Stevens*, Judge.

James Donovan, for Appellants.

Campbell, Metson & Brown, Huger Wilkinson, and *Claude Gillespie*, for Respondent.

By the Court, TALBOT, J.:

Upon further consideration, after rehearing, we see no reason for changing the views which we expressed in the original opinion, and we think justice and the law will be best subserved by allowing it to stand. (32 Nev. 278.)

As therein directed, the judgment of the district court is reversed, and the case is ordered remanded for a new trial.

SWEENEY, C. J.: I concur.

NORCROSS, J.: I dissent.

Argument for Petitioner

. [No. 2053]

THE STATE OF NEVADA, EX REL. C. A. NORCROSS,
AS COMMISSIONER OF INDUSTRY, AGRICULTURE AND
IRRIGATION, PETITIONER, v. JACOB EGGERS, STATE
CONTROLLER, RESPONDENT.

1. STATUTORY CONSTRUCTION — APPROPRIATIONS — GENERAL FUND—
SALARY OF OFFICER.

In the absence of anything to the contrary in the statute, the act of March 17, 1911, sec. 6 (Rev. Laws, 4491), fixing the salary of the commissioner of industry, agriculture, and irrigation, and directing that it be payable in equal monthly installments by the state treasurer on warrants drawn by the state controller, is a sufficient appropriation out of the state general fund.

2. STATUTORY CONSTRUCTION—APPROPRIATION—SPECIAL FUND—SALARY OF OFFICER—STATUTES—"PURPOSES."

The act of March 17, 1911, sec. 7, part of the act (Rev. Laws, 4486-4494) creating the state bureau, and the office of commissioner of industry, agriculture, and irrigation, and defining its objects and purposes, does not, by section 7, appropriating \$25,000 to carry out "the purposes of this act," and providing that all disbursements from it shall be on certificate of the commissioner, approved by the state board of examiners, indicate that such appropriation includes the salary of the commissioner, which section 6 fixes and declares payable in equal monthly installments by the state treasurer on warrants drawn by the state controller; Const. art. 5, sec. 21, expressly excluding salaries of officers "fixed by law" from the claims against the state which the board of examiners shall pass on, and "purposes" indicating something to be accomplished rather than an existing fact, so that the bureau and office of commissioner were but means for the subsequent accomplishment of the purposes of the act.

ORIGINAL PROCEEDING for *mandamus* by the State, on the relation of C. A. Norcross, as Commissioner of Industry, Agriculture and Irrigation, against Jacob Eggers, as State Controller. **Writ granted.**

The facts sufficiently appear in the opinion.

Summerfield & Richards, for Petitioner:

The salary of the commissioner of industry, agriculture and irrigation, created under the provisions of the act of March 17, 1911 (Rev. Laws, 4486-4494), is payable out of the general fund in the state treasury, and not out of the special fund created by section 7 of the above act.

Argument for Petitioner

The appropriation made by section 7 is a specific appropriation "to carry out the purposes of the act" as those purposes are set forth and defined in section 4.

By reference to the title of the act it appears that the act, in addition to creating the office of commissioner and fixing his compensation, makes an appropriation of "funds for its [bureau of industry, etc.] support and maintenance and to carry out its objects and purposes." It must be borne in mind that the bureau and the commissioner are not one and the same.

If section 7 did not appear in the act, then unquestionably section 6, which fixes the salary of the commissioner and directs that the same be payable "in equal monthly installments by the state treasurer on warrants drawn by the state controller," would be a sufficient appropriation out of the general fund, under the rule laid down by this court. (*State v. Eggers*, 29 Nev. 469; *State v. Westerfield*, 23 Nev. 473.)

Section 6 fixes the method of payment of the salary of the commissioner direct, but all payments out of the appropriation created in section 7 must be on certificate of the commissioner and approval of the board of examiners. There is no reason why the commissioner should certify to his salary, and the board of examiners can have nothing to do with salaries of officers fixed by law. (State Constitution, art. 5, sec. 21; Rev. Laws, 314, 4459.)

The language of section 7 shows that only unliquidated claims were intended to be paid out of the appropriation therein made.

Creating the office of commissioner and fixing his salary was not a "purpose" of the act, but an incident antecedent to such "purpose," which purposes the title of the act stated would be defined and which were specifically defined in sections 3 and 4.

No legislative intent can be drawn from the fact that the general appropriation bill did not contain an appropriation for the salary of the commissioner. Fixed salaries are not required to be included in the general appropriation bill. An act creating an office and fixing

Argument for Respondent

a salary of itself makes a continuing appropriation. When the general appropriation bill was passed, the bill creating the bureau of industry was not yet a law.

It has always been the contention of the commissioner that his salary was not payable out of the appropriation of \$25,000, which was intended by the legislature as a fund to be used in carrying out the objects and purposes of the act. This contention is in accordance with the public understanding at the time the act was passed. (Citing *Nevada State Journal* of March 16 and 23, 1911.) It is proper, we think, to observe that if the legislature did not understand that the appropriation in section 7 was in addition to the salary of the commissioner, the newspaper reporter would not likely have gathered that idea.

G. B. Thatcher, Attorney-General, for Respondent:

In the construction of statutes the intention of the legislature is the end to be attained, and such intention when plainly evidenced will prevail. As indicating the legislative intent the inquiry is pertinent: If the legislature did not intend that the salary of the commissioner should come out of the \$25,000 appropriation, why did it not make an appropriation for the same as for all other state officers in the general appropriation bill? The fact that it did not make such an appropriation, and the fact that it did provide an appropriation of \$25,000 in the section immediately following that in which the salary of the commissioner is fixed, proves conclusively that it was the intention of the legislature to have the salary of the commissioner paid out of the latter appropriation, upon the principle that "*expressio unius est exclusio alterius*."

"A statute," it has been said, "is to be construed, if possible, so as to give sense and meaning to every part; and this maxim was never more applicable than when applied to the interpretation of a statute." (Broome's *Legal Maxims*, p. 514.)

Having made an appropriation "to carry out the purposes of this act," it cannot be said that it was the

intention of the legislature to imply an appropriation for the payment of the commissioner's salary.

To maintain his claim of such concealed and implied appropriation, petitioner relies wholly upon the exception in section 21 of article 5 of the constitution (Rev. Laws, 314) and upon that portion of section 4492 providing for disbursements "on certificates from the commissioner, approved by the state board of examiners." What is meant by the words "certificates of the commissioner"? The form used for claims against the state has printed at the bottom these words: "I hereby certify the foregoing bill to be just and correct," etc. The argument of petitioner therefore reduces itself to the proposition that because he is authorized by section 7 to sign his name to such certificate it has the magical effect of making an additional appropriation nowhere positively expressed in the act.

The word "purposes" in section 4492 is used in the sense of design, intent or effect, and the appropriation therein provided was to carry out the intent, design or effect of the act, one important purpose of which was the payment of the salary of the commissioner. It may be argued against petitioner's contention and with equal force that it was the intention of the legislature that the commissioner shall certify to disbursements for his own salary.

Because, where a salary is fixed by law and no appropriation made for its payment, an appropriation will be implied from the general fund (*Davis v. Eggers*, 29 Nev. 469), it does not follow that where a specific appropriation is made to carry out the purposes of a certain commission, an appropriation for the salary of the commissioner out of the general fund will be implied.

By the Court, SWEENEY, C. J.:

Relator, as the commissioner of industry, agriculture, and irrigation for the State of Nevada, has instituted the foregoing proceeding against respondent, J. Eggers, as state controller of the State of Nevada, for the purpose

Opinion of the Court—Sweeney, C. J.

of requiring respondent to issue and to deliver to the Carson Valley Bank as respondent's assignee two warrants upon the state treasurer of the State of Nevada, payable out of the general fund in the Nevada state treasury, for the sum of \$300 each in course of payment of the relator's salary for the months of October and November, 1912.

It is relator's contention that, under the provisions of law, his salary is payable out of the state general fund, in which there are sufficient funds otherwise unappropriated to pay the same, while it is respondent's contention that relator's salary is payable only out of the appropriation made in the legislative act creating relator's office, and that, said appropriation being exhausted, there is no fund in the state treasury against which respondent can legally draw the demanded warrants for relator's salary. It is stipulated between counsel that there are no disputed evidentiary facts, and the sole question for us to determine is whether relator's salary is legally payable out of the state general fund.

If the court answers this question in the affirmative, the mandate asked should issue, but otherwise it should be denied.

The act in question is entitled "An act creating and establishing a Nevada bureau of industry, agriculture and irrigation, providing for a commission in charge thereof; creating the office of commissioner of industry, agriculture and irrigation and fixing his compensation; defining the objects and purposes of said bureau, prescribing the powers and duties of said commission; appropriating funds for its support and maintenance and to carry out its objects and purposes, and other matters relating thereto," approved March 17, 1911. (Rev. Laws, 4486-4494.)

Section 1 of the above-entitled act in part provides: "That there is hereby created and established a Nevada bureau of industry, agriculture and irrigation. Said bureau shall be governed and controlled by a commission which shall be designated as state commission of industry,

agriculture and irrigation, and shall be composed of five members, four of whom shall be ex officio members, namely: The governor, the surveyor-general, the attorney-general, and the state engineer, and one other member to be appointed by the governor, the office of which is hereby created, who shall be entitled commissioner of industry, agriculture and irrigation. * * *

Section 2 provides when the term of office of the commissioner shall begin, and that he shall hold office at the pleasure of the governor.

Section 3 provides for meetings of the commission, and that "no expenditure shall be made or expense contracted without it be authorized by a majority vote at such meeting," etc.

Section 4 specifically defines the "general and special powers, duties and functions of said commission," which are set forth in six subdivisions, and includes the gathering and disseminating of information relative to the resources of the state, the conducting of "reasonable and practicable explorations and experiments to determine the feasibility of reclaiming favorable portions of the state, the control of the selection, management and disposal of all lands granted the state under the provisions of the act of Congress * * * known as the Carey Act," and other matters of a kindred nature.

Section 5 provides that the commission may accept certain contributions which shall go into a special fund in the state treasury "called industrial commission fund," and that boards of county commissioners may, in their discretion, make appropriations from the county treasuries "to meet in part the cost or expense of any exploration or experimental work conducted in such county."

Section 6 provides: "Said commissioner shall receive a salary of three thousand six hundred dollars per annum, payable in equal monthly installments by the state treasurer on warrants drawn by the state controller. The members of said commission when engaged in field work or delegated to special duty shall be entitled to actual

traveling, living and other necessary expenses, which shall be audited by the commission and on the certificate of the commissioner, approved by the state board of examiners, shall be paid by the state treasurer on warrants of the state controller, out of any moneys in the treasury available therefor."

Section 7 provides: "There is hereby appropriated to carry out the purposes of this act, the sum of \$25,000, and all disbursements from which, as well as from the said industrial commission fund, shall be on certificates of the commissioner, approved by the state board of examiners, when the state controller shall draw his warrant and the state treasurer pay the same."

Section 8 provides for certain printing, and section 9 contains certain penal provisions.

It is the contention of respondent that the salary of the commissioner is payable out of the \$25,000 appropriated under the provisions of section 7 above quoted, while relator contends that that fund is specifically appropriated "to carry out the purposes of the act," as those purposes are set forth and defined in section 4 of the act. By a reference to the title of the act, it appears that the act, in addition to creating the office of commissioner and fixing his compensation, makes appropriation of "funds for its (Nevada bureau of industry, agriculture and irrigation) support and maintenance and to carry out its objects and purposes." It must be borne in mind throughout the interpretation of this act that the commissioner and the bureau are not one and the same. The bureau is governed by a commission of five members, one of whom is the commissioner, "who shall keep his office in said bureau." (Section 3.)

[1] If section 7 did not appear in the act then unquestionably section 6, which fixes the salary of the commissioner and directs that the same be payable "in equal monthly installments by the state treasurer on warrants drawn by the controller," would be a sufficient appropriation out of the general fund under the rule heretofore laid down by decisions of this court. (*State*

v. *Eggers*, 29 Nev. 469, 16 L. R. A., N. S., 630; *State v. Westerfield*, 23 Nev. 473.)

[2] There is no specific provision in section 7 that the salary of the commissioner shall be paid out of the \$25,000 therein appropriated, but there is a provision that "all disbursements from which * * * shall be on certificates of the commissioner, approved by the state board of examiners." If, then, the commissioner's salary is payable out of this fund, then the commissioner must first certify to his salary, and submit the same to the board of examiners, and have the latter board approve the same before the controller may draw his warrant. But section 6 says the "commissioner shall receive a salary of three thousand six hundred dollars per annum, payable in equal monthly installments by the state treasurer on warrants drawn by the state controller." This latter section fixes the method of payment direct, independent of any certificate or approval of the board of examiners. The salary of the commissioner is a fixed charge against the state. There is no reason why the commissioner should certify to the same, and there is nothing for the board of examiners to audit and allow. The board of examiners have nothing to do with salaries of officers. Section 21 of article 5 of the constitution creates the board of examiners, "with powers to examine all claims against the state (except salaries or compensation of officers fixed by law)." (Rev. Laws, 314.) Such board, therefore, can have no power to examine, approve or disapprove fixed salaries of officers. Such claims as have been by law authorized, "but of which the amount has not been liquidated and fixed, may be presented to the board of examiners," is the language of the statute regulating the duties of the board of examiners. (Rev. Laws, 4459.) This is in accord with the constitution. It is not to be presumed that the legislature intended to require the board of examiners to approve a fixed claim for salary, when the constitution expressly takes that class of claims out of the consideration of such board. Since

section 7 provides that all payments from the \$25,000 must be approved by the board of examiners, the only logical deduction is that disbursements from that fund must all be of the character which the board of examiners are authorized and required to approve. As they are not authorized or required to approve the salary of the commissioner, it follows that such salary was not intended to have been paid out of such appropriation. There is nothing in the language of section 7 which indicates an intent on the part of the legislature that the appropriation of \$25,000 should include the salary of the commissioner, while as before pointed out, there is language used manifesting a contrary intent. The word "purposes" indicates something to be accomplished rather than an existing fact. See Webster, Words and Phrases. The purposes of the act are defined therein. The creation of the bureau and the office of commissioner were accomplished the moment the act went into effect. They were but means for the subsequent accomplishment of the purposes of the act. If the legislature had intended that the \$25,000 appropriated by section 7 should include salaries, instead of using language negating such intent, it would have used language manifesting such intent, as it did in the case of the act in relation to banks and banking and creating the office of state bank examiner and fixing his salary, which act was passed at the same session of the legislature. Section 78 of the latter act (Rev. Laws, 693) provides: "For the purpose of carrying this act into effect and paying the salaries and expenses herein provided for and incident thereto, the sum of twenty thousand dollars is hereby appropriated out of the state treasury."

In reviewing the entire act under consideration and in the light of the law and authorities submitted, we are of the opinion that relator is entitled to his salary from the general fund. Let the writ issue as prayed for.

TALBOT, J.: I concur.

NORCROSS, J., deeming himself disqualified, did not participate in the foregoing decision.

Argument for Appellant

[No. 2046]

GERTRUDE ELEANOR TIEDEMANN, APPELLANT, v.
RUDOLPH ERNEST TIEDEMANN, RESPONDENT.

1. PROCESS—SERVICE—IMMUNITY.

Where a nonresident brought *habeas corpus* within the state against his wife for the possession of their minor child, he was not immune, while in the state for such purpose, from service of summons in a divorce suit; Rev. Laws, 5445, exonerating persons from arrest in a civil action while attending court as a witness, not protecting him from being served with a summons or applying to him while voluntarily in the state maintaining his own suit.

2. APPEAL AND ERROR—FINAL ORDER—QUASHING SERVICE.

An order quashing personal service of summons, made on a nonresident defendant while within the state, was a final order from which an appeal would lie under civil practice act, sec. 383 (Rev. Laws, 5325).

APPEAL from the First Judicial District Court, Ormsby County; *Frank P. Langan*, Judge.

Action by Gertrude Eleanor Tiedemann against Rudolph Ernest Tiedemann for divorce and other relief. From an order quashing the service of summons, plaintiff appeals. **Reversed**, with directions.

The facts sufficiently appear in the opinion.

Alfred Chartz, for Appellant:

The order appealed from was made in a civil action, and is not expressly made final by the act (Rev. Laws, 5325), and it may be reviewed as prescribed by this act and not otherwise. Section 5325 changes the rule as announced in *Keyser v. Taylor*, 4 Nev. 435.

The order quashing service of summons is a final order, because, if the original service is good, all other service would be bad, inutile and futile. (2 Ency. Pl. & Pr. 53, 88; 19 Id. 575; *Mayenbaum v. Murphy*, 5 Nev. 383.)

Respondent was not privileged from service of summons upon him. Rev. Laws, 5445, describing who shall be exempt and immune, bars out all others. (*Ellis v. Degarmo*, 17 R. I. 715, 24 Atl. 579, 19 L. R. A. 560; *Netograph Co. v. Scrugham*, 197 N. Y. 337; *In re Healy*, 53 Vt. 694; *Page v. Randall*, 6 Cal. 32; *Rogers v. Bullock*, 3 N. J. Law, 517.)

Argument for Respondent

It must be borne in mind that Rudolph Ernest Tiedemann did not come to Nevada under compulsion as either a witness or a suitor. He came for the purpose of prosecuting a suit in his own behalf, and he was sued in a correlated matter by his wife as to who should have the care, control and custody of the child, the fruit of their marriage. (*Plomer v. MacDonough*, 1 Dec. & Sm. 232.)

Samuel Platt, for Respondent:

The court has no jurisdiction to entertain the appeal in this case. The record shows the appeal is taken from an order quashing a return of summons. This is not a final judgment or order as contemplated by the laws of the State of Nevada which will confer jurisdiction upon this court. (*Ency. Pl. & Pr.*, vol. 7, pp. 902-905; *Warren & Co. v. Smith & Co.*, 80 Ky. 216-219; *Oland v. Watertown*, 69 Md. 248-252; *Standard D. Co. v. Frehan*, 34 Neb. 434; *Bank v. Hughes*, 152 Fed. 414; *Winn v. Carter*, 102 Ky. 370-373; *Persinger v. Tinkle*, 34 Neb. 5; *Brown v. Rice*, 30 Neb. 236-240; *Honerine M. & M. Co. v. Tallerday*, 30 Utah, 449; *Evans v. Iles*, 7 Ohio St. 235.)

If counsel in the lower court had stood upon the record and had asked for an order of dismissal of the action, and the court had entered such an order, it might have been construed as a final order in the case. No such steps were taken, and the case as it now stands of record has not been disposed of. The order is clearly interlocutory, as the above authorities substantiate.

A cursory analysis of the wording of the statute (Rev. Laws, 5325) disproves appellant's contention. There is nothing in the act which expressly makes final an order such as the one in the case at bar. This is the only exception provided in the statute.

Counsel also cites section 5445 of the Compiled Laws of Nevada, to the effect that a witness before a court should be exonerated from arrest in a civil action while going to the place of attendance, etc. An examination of the following authorities will disclose the fact that immunity granted to suitors, as distinguished from

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witnesses, is not founded upon a statutory regulation, but upon the common law and abstract principles of justice which the courts of different jurisdictions have made a part of the law, not only of this country, but of this state. All suitors and witnesses coming from foreign jurisdictions for the sole purpose of attending court, whether under summons or subpoena or not, are held immune from service of civil process while engaged in such attendance and for a reasonable time coming and going. (32 Cyc. 492, and cases therein cited; *Person v. Grier*, 66 N. Y. 124; *Matthews v. Tufts*, 87 N. Y. 568; *Cooper v. Wyman*, 122 N. C. 784; *Andrews v. Lembeck*, 46 Ohio St. 38; *Halsey v. Stewart*, 4 N. J. Law, 366; *Mitchell v. Huron Circuit Judge*, 53 Mich. 542; *Re Healy*, 53 Vt. 694, 38 Am. Rep. 713; *Bridges v. Sheldon*, 7 Fed. 36; *Small v. Montgomery*, 23 Fed. 707; *Wilson v. Donaldson*, 3 L. R. A. 266; *Ellis v. Degarmo*, 19 L. R. A. 565; *Barber v. Knowles*, 14 L. R. A. 663; *Gregg v. Sumner*, 21 Ill. App. 110; *Jacobsen v. Hosmer*, 76 Mich. 542; *Andrews v. Lembeck*, 46 Ohio St. 40.)

By the Court, SWEENEY, C. J.:

It appears that Rudolph Ernest Tiedemann, a resident of Norwich, Conn., came to Carson City, Ormsby County, State of Nevada, and, through the institution of *habeas corpus* proceedings, attempted to obtain possession of the minor child of plaintiff and defendant. The petition for the writ was resisted by Gertrude Eleanor Tiedemann, his wife, and, after a hearing of the application for the writ upon its merits, the mother was allowed to retain possession of the child, awarded the custody thereof, and the proceedings dismissed. The respondent, while here, was sued by his wife, who filed a complaint in an action for divorce against him, alleging that she was a resident of Ormsby County, State of Nevada, stating her grounds of divorce, and prayed for alimony *pendente lite*, an accounting and division of community property, custody of the same child, alimony, maintenance for the child, attorney's fee, decree of divorce, and other relief. Upon filing the said complaint, a summons was legally issued

thereon and regularly served upon the defendant and respondent while in Carson City, Nevada. Upon the return of the summons, Samuel Platt, Esq., who represented respondent in the contested *habeas corpus* proceedings, appeared specially and moved to set aside and quash said summons upon the ground that the respondent, Tiedemann, was immune from service while in Nevada for the purpose of prosecuting the *habeas corpus* proceedings above adverted to. The lower court sustained his position, and made an order setting aside and quashing service of said summons. It is from this order appellant has appealed, and the respondent, Tiedemann, appearing through Samuel Platt, Esq., specially moves a dismissal of this appeal upon the ground that an appeal will not lie from an order setting aside and quashing a service of summons.

Two questions are involved for our consideration: First, did the trial court err in setting aside and quashing the service of summons; and, secondly, if so, is the order setting aside and quashing the return of summons under the circumstances appealable?

[1] We believe that the trial court erred in making the order appealed from. Section 5445 of the Revised Laws of Nevada provides as follows: "Every person who has been in good faith served with a subpoena to attend as a witness before a court, judge, commissioner, referee, or other person, in a case where the disobedience of the witness may be punished as a contempt, shall be exonerated from arrest in a civil action while going to the place of attendance, necessarily remaining there, and returning therefrom."

Counsel for appellant, invoking the maxim "*inclusio unius est exclusio alterius*," contends that, in view of the fact that our legislature has seen fit to enumerate under what circumstances certain parties may be immune from service of process, and having made no express provision which would exclude respondent from service under the circumstances in this case, under this well-known maxim

we must hold that he is not immune from service. The argument made goes partially to the solution of the construction we should place on the ruling we make, but we have more conclusive reasons, which we deem sufficient to support our conclusion, that the respondent was not immune from the service under the circumstances of this case. It has been properly held that "the exemption of a nonresident of a state from arrest while in attendance upon court does not extend to a writ of service of summons." (*Ellis v. Degarmo*, 17 R. I. 715, 24 Atl. 579, 19 L. R. A. 560.)

The respondent, Tiedemann, it must be remembered, did not come to Nevada under compulsion as either a witness or as a suitor. He came voluntarily for the purpose of presenting a suit in his own behalf, seeking the aid of our law and our courts, as was his right to do, and in this respect our courts were open to him, and he was given a fair and impartial hearing on his contentions, and, after due consideration, his contentions were found without merit. While here, his wife, alleging herself to be a resident of Ormsby County, Nevada, saw fit to bring an action for divorce against him, wherein she too desired to have awarded to her, in a proper proceeding, the custody of the same child in question, an accounting and division of the community property she asserted title to, alimony for herself and maintenance for her child, and other substantial rights, which she desired to invoke our laws and our courts to award and protect, and regularly commenced her action and had served our process on the respondent while he was here and within the jurisdiction of the court. It is quite impossible for us, either as a matter of law or equity, to say that a non-resident can come here seeking the relief of our courts when he desires, and at the same time deny the same right to one of our Nevada citizens to sue him when substantial rights are claimed and pleaded and service made within the jurisdiction of the court in accordance with our law.

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Both parties are equal before the law; both entitled to invoke the aid of our law and our courts to enforce their legal and substantial rights. Both are entitled to a hearing, and the respondent having used our court, and through its process having forced the appearance of appellant to answer the demands of the rights he contended for, there is no good or sufficient reason in law or equity why he should not be compelled to submit to the same process issued from the same court when he has been regularly served within the jurisdiction of the court, and to show cause, if any he has, why such relief prayed for by the appellant should not be awarded.

As was held in the case of *Netograph Mfg. Co. v. Scrugham*, 197 N. Y. 377, 90 N. E. 962, 27 L. R. A. (N. S.) 333, 134 Am. St. Rep. 886, "the exemption of a suitor or witness from process is not a natural right, but a privilege having its origin in the necessity for protecting courts from interruption and delay, and witnesses or parties from the temptation to disobey process."

In the present case it cannot be successfully contended that the respondent is in a position to claim immunity for either of the reasons assigned in the foregoing authority.

There seems and there ought to be a well-defined distinction recognized in the authorities between those who may be entitled to immunity from arrest when within the jurisdiction on civil process, as distinguished from immunity from service of civil process, and also a well-defined line of distinction between those who may be immune from civil process when they are brought into a state through compulsion, and where they are in attendance or obedience to some character of subpoena or other civil process, and where they may come voluntarily. In nearly all cases where they come within the jurisdiction by force or compulsion to attend court as a suitor or witness, they are invariably immune from criminal arrest, and nearly always from all character of civil process; but where one, as in the case at bar, comes within our jurisdiction voluntarily and without compulsion, or because of any action having been started previously

against him or process attempted to be served upon him by publication or otherwise, and comes prepared to adjudicate his right to some subject-matter, as respondent was in this action, and is personally and regularly served when within the jurisdiction on matters affecting the same correlated subject-matter, and the action is brought in good faith and calls for the adjudication of substantial rights, he is in no position to resist the lawful process of the court nor claim the exemption which was successfully pleaded and decreed in the lower court in setting aside the service and quashing the summons regularly served in the action therein started.

[2] Is the order complained of of such a final nature as will permit of an appeal therefrom? Section 383 of the civil practice act provides: "A judgment or order in a civil action, except when expressly made final by this act, may be reviewed as prescribed by this title, and not otherwise." In view of the substantial rights pleaded in the complaint, the order complained of, blocking, as it does, appellant's right to proceed to a complete and effective recovery of these rights, should they be decreed to her, is, we believe, in effect a final judgment. Like a final judgment there remains nothing to be judicially determined between the parties in the trial court which can be legally proceeded with until this order, which bars a complete and effective recovery, is reversed. To hold that appellant should be forced to proceed to procure a further service on the defendant in Connecticut, or without the jurisdiction or elsewhere, when she already has a valid personal service within the jurisdiction, and to force appellant to proceed through to final judgment before she could appeal, would be a senseless construction to place upon our civil procedure act affecting final judgments and orders, and an unquestioned deprivation of the plain, speedy and adequate remedy to which appellant is entitled.

The order of the lower court, if allowed to prevail, would deprive plaintiff of her substantial rights and the benefit of a personal service and such rights as flow from

Talbot, J., concurring

that service, to which she may be entitled. The service having been regularly made, as we have heretofore pointed out, it follows that any other service would be a mere nullity, as the summons has already served its purpose when it is served regularly and becomes *functus officio*. Where a service is insufficient, a second or further service to remedy or replace the faulty service is oftentimes allowable, but the first service which is regularly made renders the others which may follow of no effect. (*Mayenbaum v. Murphy*, 5 Nev. 383; Ency. Pl. & Pr., vol. 19, p. 575.)

The order appealed from is reversed, with instructions to the lower court to allow the defendant such reasonable time to plead or answer as may be deemed meet and proper.

It is so ordered.

TALBOT, J., concurring:

I concur in the opinion and order as written by the chief justice. If the defendant were residing in this state, so that a new personal service of summons could be made upon him, I would regard any order of a district court quashing the service of summons as not final and not appealable, because the order would then be interlocutory, for a new service of summons could be had to remedy the defect for which the first service was quashed, and the case could be carried on to a binding final judgment. With the defendant residing on the other side of the continent—in Connecticut—and resisting the service which was made upon him when he came here voluntarily for an important special purpose, it is apparent that personal service in this state cannot again be obtained upon him in the action, and that the service already made is final in so far as a judgment upon personal service in this state may be obtained. True, if the order quashing the service were sustained or held not to be final and appealable, a new service could be obtained by publication, but a judgment upon such service, regarding the custody of children and property rights, is not

Norcross, J., concurring

of the same force in other states as one obtained upon personal service, and when for divorce has been held by some of the courts of the Union not to be binding out of the state in which it is granted. As to these benefits which flow from a judgment on personal service, and which are not attainable through a decree obtained upon service by publication, the order quashing the service is final, for, if the order is allowed to stand, they cannot be obtained in cases like this, where another personal service cannot be had in the state.

Therefore I conclude that the order quashing the service is appealable in this particular case.

NORCROSS, J., concurring:

I concur in the views of my associates that the court below erred in quashing the summons. I am inclined to the view that the order could properly have been reviewed by writ of error; but, as this court has never had occasion to consider in what character of cases the writ of error will lie, if at all, I express no definite opinion upon that question.

Argument for Appellant

[No. 2002]

STATE OF NEVADA, RESPONDENT, v. NIMROD
URIE, APPELLANT.

1. CRIMINAL LAW—APPEAL—HARMLESS ERROR—ADMISSION OF EVIDENCE.

Admission of improper evidence is not as a rule prejudicial, where subsequently withdrawn, with directions to the jury to disregard it.

2. CRIMINAL LAW—TRIAL—APPEAL—CURING ERROR.

The court admitted accused's alleged confession in evidence, and afterwards, upon it appearing that it was made after the sheriff had told accused that it would be better for him to tell the truth, ordered the confession stricken and directed the jury to disregard it, and also instructed that the jury must not consider any evidence stricken by order of the court, but must decide the case solely upon the evidence actually given and allowed. *Held*, that any error in admitting the confession in evidence was cured by the court's action.

3. CRIMINAL LAW—APPEAL—HARMLESS ERROR—ADMISSION OF EVIDENCE.

Any error in admitting an alleged confession in evidence could not have prejudiced the accused where he testified to substantially the same facts stated in the confession.

4. WITNESSES—WAIVER OF CONSTITUTIONAL PRIVILEGE.

When accused waives his constitutional privilege not to testify, and becomes a witness for himself, he cannot testify to that part of the transaction favorable to himself and claim his privilege as to the remainder.

5. CRIMINAL LAW—APPEAL—ASSIGNMENTS OF ERROR—FAILURE TO DISCUSS.

Accused's counsel waived assignments of error not discussed in his brief.

APPEAL from the Sixth Judicial District Court, Humboldt County; *Edward A. Ducker*, Judge.

Nimrod Urie was convicted of murder in the first degree, and he appeals from the judgment of conviction and order denying a motion for new trial. **Affirmed.**

The facts sufficiently appear in the opinion.

James H. Wise, for Appellant:

It is the duty of the prosecution to show that the confession was voluntary. There is absolutely no proof that the confession was voluntary. All the evidence of

Argument for Respondent

Sheriff Lamb was conclusions and not facts, and should have been ruled out at the time. The rule is that confessions made to parties in authority, such as sheriffs, deputy sheriffs, prosecuting attorneys and constables, are presumed to have been made by promises. (*People v. Thompson*, 84 Cal. 568, 24 Pac. 384; *People v. Barrack*, 49 Cal. 342; 12 Cyc. 471, note 39; *People v. Silvers*, 92 Pac. 506; *People v. Loper*, 112 Pac. 720; *Bram v. United States*, 168 U. S. 532; *State v. Saunders*, 14 Or. 300, 12 Pac. 441; *State v. Moore*, 32 Or. 65, 48 Pac. 468; *Mitchell v. State*, 94 Ala. 68; *State v. Pancoast*, 67 N. W. 1062; *People v. Rozelle*, 78 Cal. 84, 20 Pac. 36; *People v. O'Brien*, 66 Cal. 602-603, 6 Pac. 695; *People v. Gallagher*, 100 Cal. 466-476, 35 Pac. 80.)

It was error for the court to permit the confession to be read in evidence and then afterwards to show the facts under which said confession was obtained, and then to strike out the confession. (*State v. Bixcoe*, 67 Md. 6, 8 Atl. 571; *State v. Fox*, 121 N. Y. 449, 24 N. E. 923; *State v. Soto*, 49 Cal. 67.)

Where a confession has gone to a jury upon preliminary proof that it was voluntary and it subsequently appears during the trial that it was involuntary, it is the duty of the court to withdraw such confession from the consideration of the jury and to instruct them that they should wholly disregard it.

Cleveland H. Baker, Attorney-General, for Respondent:

If any error was committed by the introduction of said confession, it was thoroughly cured by the action of the court in striking the same from evidence and instructing the jury to disregard the same.

The cross-examination of the appellant was proper upon the grounds that when the accused waives his constitutional privilege and voluntarily takes the stand as a witness in his own behalf and relates a part of his connection with a matter, he is not allowed to relate merely that portion of the transaction which is favorable to himself, but can be compelled to detail the entire transaction

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whether criminatory to himself or not. (2 Willoughby on the Constitution, 825; *Brown v. Walker*, 161 U. S. 597.)

"A defendant cannot be prejudiced by the admission of a confession which he voluntarily acknowledges, under oath, is the truth." (*State v. Johnny*, 29 Nev. 219.)

By the Court, NORCROSS, J.:

Appellant was jointly indicted with one J. Frank Tramner by the grand jury of Humboldt County for the murder of one Eugene Quilici. Upon a separate trial before the Sixth judicial district court he was convicted of murder in the first degree, and the penalty of death was imposed by the jury.

From the judgment based on the verdict and from an order denying a motion for a new trial, the defendant has appealed.

The case was finally submitted to this court on briefs. Although the record contains some sixteen assignments of error, only two propositions involving alleged error are considered in the briefs filed.

The court admitted as a part of the state's evidence, over the objection of defendant, the following written confession of the defendant: "My full name is Nim R. Urie. My age is 23 years on August 1st. I know Diffendarfer. I knew Diffendarfer about fourteen years. I knew Frank Tramner since last April. Next day after Tramner returned from having taken Diffendarfer to Dutch Flat, I told him he could look after things there at the ranch, and I would come up here at Winnemucca to see if I couldn't get work, and he told me, 'It is no use going to work. You don't need to work,' he says. 'I will tell you how we can make some easy money'; and I says, 'All right, how is that?' And he says, 'We will go up here, and hold up the Dago saloon.' I told him I didn't want to do anything of that kind, and I could go to work in a few days. I could sell the horses anyway, and we didn't need to do anything like that. He says, 'Well, we are going to do it anyhow'; and then he went to work and told me how easy it would be to

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get this money, and I told him, 'No'; that I didn't want to make that kind of money. And he says, 'We are going to do it, and you have got to do it; if you show any signs of turning me down or running off, I will kill you.' And then the next day we still talked about it, and I told him that day that if we did have to do it, and would kill any one, it would be bad, that we would get caught, and would both get in trouble, and he says, 'We won't need to kill him at all; we will go in there and throw our guns on him, and tell him to throw up his hands.' And I told him I didn't want to do it at all. And he told me again that I had to do it, and I came up here to Winnemucca the day before this happened, and before I left he told me that if I tried to run off, or get away or anything, that he would kill me if he had to follow me for ten years to do it. I thought when I started I would go anyhow, and I stayed up here one day thinking about it, and then I thought that I would talk him out of it, and I went back. I went down home that night, and he asked me what I thought of it by that time, and I asked him if he wouldn't let me go, and go some place and go to work, and he said, 'No, you got to do this, and there is no use saying any more; you have got to do it.' Then I didn't say any more to him till the night that we started, and he got up the horses and came into me and says, 'You might as well get ready; we are going to do that.' And then he went in and fixed up these masks. And then we got supper, and then we went out and got on our horses, and he took the guns, and, when we got within two or three hundred yards of the Dago saloon, he tied my horse and took a rope, and tied my hands to the saddle horn. I was standing off to the side of the horse, and then he went up to Slaughter's saloon and got a bottle of whisky. And he came back and says, 'Throw some of this into you, and maybe you will feel better afterwards.' I took three or four big drinks, and then we put the masks on, and then he loaded the rifle and handed it to me, and told me to go ahead, and I went ahead until we got to the saloon.

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And, when I got to the saloon door, I said, 'Frank, let's not do it'; and he shoved his gun up against my back, and said, 'Go on.' We went inside of the door, and I threw down on the Dago. Frank says, 'Throw up your hands,' and the Dago didn't do it. He got up and grabbed my rifle, and Frank shot; the Dago started to run out the door. Frank turned around to me, and says, 'What have you got that gun for? Why don't you use it?' He grabbed it out of my hands, and shot just as the Dago went out the door. Then he turned around, and handed the gun to me, and the Dago woman started to run, and he shot her with the six-shooter, and then he says to me, 'Lay your gun on the bar and go in, and get the money out of the register.' And then told me to put the money in my pocket. Then he told me to go in and search the rooms. And, when I went into this back room, these two boys were there. I went back and told Frank, 'There is some one in there'; and he says, 'Take your gun, go back, and make them hold up their hands, and ask them where the money is.' And then he says, 'We will go out the back door now.' And we went out the back door, and we went down to where our horses was, and I threw the cartridge out of my rifle, and he said, 'Give me that gun.' Then we got on our horses and rode down home. Then we got off and he told me to pull off the overalls and jumper and things I had on, and then he took me in the house and locked the door, and told me to give him the money that I had. Then he went off and rode off some place, and was gone about one-half hour. And then he came back. He came back into the room. He told me, 'Now you don't dare squeal. You are in for it just as bad as I am'; and he told me, 'Now you want to play sick in the morning'; and he says, 'Tell them that when I went up town last night, I went up to get some whisky and medicine for you.' And he says, 'Now, if they catch us, you want to act as if nothing is wrong, and that you didn't know anything about it and that you were home sick'; and he says, 'If you don't do this and we get out of it, if you

show any weak signs, I will kill you.' When I gave him these clothes, he asked me where the mask was, and I says, 'I guess I have lost it.' He says, 'You are a pretty son of a bitch. I ought to plug you right here.' I told him that I didn't do it intentionally, that I didn't mean to lose the mask. We went to bed about 10:30 slow time. When we got to where he tied the horses, he said he would have to go up and see how things were. That I make this confession freely and voluntarily and without persuasion or promise of leniency of any kind either by Sheriff Lamb, Mr. Rich, J. A. Callahan, or any other person or persons whomsoever."

Subsequently the court ordered the confession stricken out, and at the time instructed the jury to disregard the same. The court also in its instructions embodied the following: "The jury must not regard or consider any evidence which has been excluded by the court or stricken out by the order of the court, but they must decide the case solely upon the evidence actually given and allowed."

It is contended that the court erred in the admission of this confession, and that the error was not cured by the court subsequently striking out the same. At the time the confession was offered witnesses testified to the effect that, although the confession was made while defendant was in the custody of the sheriff, it was a voluntary confession made without force, threats, or promises or inducements of reward or leniency.

Objection was made to the testimony offered in support of the confession that the questions asked by the district attorney were leading and calling for the opinion of the witnesses. The objections were overruled.

Counsel for defendant declined to cross-examine the witnesses at the time or to offer evidence showing, or tending to show, that the confession was not voluntary.

After the confession was admitted in evidence, and at a later period in the trial, counsel for defendant placed defendant on the stand, and had him testify relative to the circumstances of his making the confession. The

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gist of his testimony was that the sheriff and district attorney told him that "it would be better for him if he would tell the right story."

Counsel for defendant also called the sheriff and other witnesses to the confession for cross-examination. As a result of this testimony, the court, among other matters, stated: "As it appears in the record here that the sheriff, who had the prisoner in custody at that time, admits in the record that he might have said that. As a matter of course Constable Rich later on testifies that he thinks that he didn't say it; but there is some doubt. There is some doubt in the court's mind as to whether that was said down there at that time by the sheriff. And for that reason, although the court is quite certain that on account of your not making the cross-examination at the proper time, and offering your testimony at that time when the foundation was being made, it would be no error. I am going to take plaintiff's Exhibit W, containing the alleged statements of the defendant, as read to the jury and admitted in evidence, from the consideration of the jury. And it will be so ordered."

[1, 2] It is a general rule that the admission of any improper evidence is not deemed prejudicial error when the same is subsequently withdrawn, and the jury directed to disregard it. A number of authorities supporting this well-recognized rule are cited in the brief of the attorney-general. It cannot be said, we think, under the facts shown, that any error which might have been committed in the admission of the confession was not cured by the subsequent action of the court.

[3] Even if we were to concede error in the admission of the confession, and that the same was not cured by its subsequent exclusion, no prejudicial error could be shown, for the reason that the defendant became a witness in his own behalf, and testified substantially in accordance with his confession. (*State v. Johnny*, 29 Nev. 203, 219; *State v. Williams*, 31 Nev. 360.)

Error is assigned in the overruling of certain objections

to the cross-examination of the defendant by the district attorney. The defendant was called as a witness in his own behalf and questioned by his counsel concerning a portion of his actions and those of his codefendant on the night of the murder and robbery. He detailed the events which transpired up to the time of the entry of the saloon of Quilici, but stopped short of detailing the circumstances of the actual shooting of Quilici. On cross-examination the district attorney, over the objection of defendant, was permitted to examine the defendant upon the events which transpired beyond the time covered by his direct examination. We think this was clearly proper.

[4] When defendant waives his constitutional privilege of remaining silent and becomes a witness in his own behalf, he cannot assume a right to detail a part of a transaction which he deems favorable to himself and claim an exemption upon subsequent facts forming part of the entire transaction. (*Brown v. Walker*, 161 U. S. 597, 16 Sup. Ct. 644, 40 L. Ed. 819; *Commonwealth v. Pratt*, 126 Mass. 462; *Evans v. O'Connor*, 174 Mass. 287, 54 N. E. 557, 75 Am. St. Rep. 316; *Samuel v. People*, 164 Ill. 379, 45 N. E. 728; *People v. Freshour*, 55 Cal. 375; *Greenl. Ev.* 451.)

"The general rule may be stated to be that, where a defendant takes the stand as a witness in his own behalf, he waives his right to refuse to answer questions which tend to incriminate him concerning all matters which were touched upon in his direct examination, and upon all other matters which are so related to his direct examination as to come within the proper limits of cross-examination. In other words, the defendant loses his character as a party, becomes a mere witness, and may be examined as fully as any other witness. If he makes any statement respecting the transaction, he may be required to state all." (Note to *Evans v. O'Connor*, *supra*, 75 Am. St. Rep. 332.)

[5] The fact that counsel for appellant did not refer in his briefs to any of the other assignments of error warrants the assumption that he places no reliance upon

Points decided

them. Such an examination of the assignments as is justified under the circumstances discloses no apparent prejudicial error.

The judgment and order appealed from are affirmed, and the court below is directed to fix a time and make all necessary and proper orders for having its sentence carried into effect by the warden of the state prison.

[No. 2025]

STATE OF NEVADA, RESPONDENT, v. FRANKLIN
WILLIAMS, APPELLANT.

1. GRAND JURY—GRAND JURORS—QUALIFICATION—OPINION.

Section 7005, Rev. Laws, provides that a grand juror may be disqualified when a state of mind exists on his part with reference to the case, or to either party, which will prevent him from acting without prejudice to the rights of the challenging party, but that no person is disqualified as a grand juror by reason of having formed or expressed an opinion on the matter submitted, founded on public rumor, statements in the public journals, or common notoriety, provided that it appears by his oath or otherwise that he will, notwithstanding such opinion, act impartially on the matters submitted to him. *Held*, that a grand juror, who had formed a belief or opinion from statements made to him that defendants were keeping a gambling place, was not disqualified where he further testified that his opinion was not such as would justify him in making a charge against accused.

2. CRIMINAL LAW—ACCOMPLICES—CORROBORATION.

In a prosecution for permitting unlawful gambling in the defendant's place of business, evidence that other unlawful games were played there, and that the game in question, as testified to by the participants and other witnesses, was carried on with the door locked and attended by defendant's brother, furnished sufficient corroboration of the testimony of accomplices required by section 7180, Rev. Laws, to sustain a conviction.

3. CRIMINAL LAW — TRIAL — MISCONDUCT OF ATTORNEY — DEFENDANT'S FAILURE TO TESTIFY—REFERENCE.

In a prosecution for permitting gambling on defendant's premises, a statement by the district attorney in argument, "Why didn't the defendant call any witnesses to the stand? Why didn't he put his brother on the stand, his attendant? * * * I will tell you why; he didn't dare do it," was not objectionable as a reference to defendant's failure to testify in his own behalf.

Argument for Appellant

APPEAL from Sixth Judicial District Court, Humboldt County; *Edward A. Ducker*, Judge.

Franklin Williams, indicted under the name of F. M. Williams, was convicted of permitting unlawful gambling in his place of business, and he appeals: **Affirmed.**

The facts sufficiently appear in the opinion.

Salter & Robins, for Appellant:

The court should have set aside the indictment, as grand juror R. Battels was disqualified, as shown by his own testimony. (Rev. Laws, 7005; *People v. Landis*, 73 Pac. 153.)

The only testimony showing, or tending to show, that any poker game or any gambling game was being permitted, if at all, on the day alleged in the indictment was that of witness Diehl and witness Biggins. If their testimony is true, each of them was an accomplice. Their testimony is uncorroborated, and defendant's instruction No. 2, which had reference to the law requiring such testimony to be corroborated, should have been given by the court. Its refusal was error. (*People v. Coffey*, 119 Pac. 90; *State v. Bass*, 127 S. W. 1020; *State v. Umble*, 22 S. W. 378; *State v. Davidson*, 33 Ala. 350; *State v. Rasor*, 121 S. W. 512; *State v. Light*, 17 Or. 358, 21 Pac. 132.)

Each of the said witnesses aided and abetted and encouraged the commission of the alleged offense, and without their aid and encouragement no offense could have been committed, if any was committed. They are accessories and accomplices. (*State v. Jones*, 7 Nev. 408.)

In his argument the district attorney commented unfavorably on the defendant's failure to produce his brother or any witness in his defense. The court refused, after request of defendant, to instruct the jury to disregard these remarks. They were unwarranted and prejudicial. (Rev. Laws, 7456; *People v. Smith*, 53 Pac. 802; *People v. Quimby*, 92 Pac. 493; *People v. Blodgett*, 92 Pac. 820; *People v. Benc*, 62 Pac. 404.)

The comment of the district attorney in his closing argument in referring to the costs which would accrue to

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the taxpayers, in the event they did not find a verdict of guilty in this case and the defendant were tried on another indictment which had been found against him, was prejudicial, unwarranted and not supported by the evidence, and did, in the nature of things, inflame the minds of the jury, especially so after objection and request of defendant that the court instruct the jury to disregard the remarks, which request was refused. (*State v. Rodriguez*, 31 Nev. 342; *People v. Quimby*, 92 Pac. 492; *State v. Chambers*, 75 Pac. 277; *State v. Humphrey*, 21 Tex. 666; *State v. Jenkins*, 49 Tex. App. 462.)

The verdict was contrary to the evidence because the alleged offense, if proven at all, was proven solely by the testimony of accomplices, whose testimony was uncorroborated. (Rev. Laws, 7005.)

Cleveland H. Baker, Attorney-General, and *J. A. Callahan*, District Attorney of Humboldt County, for Respondent:

The trial court committed no error in refusing the defendant's instruction No. 2, which bears on the question of accomplices. (12 Cyc. 445-446; *People v. Collum*, 54 Pac. 598; *State v. Durnam*, 73 Minn. 165, 75 N. W. 1127; *State v. Gordon*, 117 N. W. 483; *Queen v. Boyes*, 121 Eng. Rep. 730; *Rex v. Horgrave*, 24 Eng. Com. Law, 509; *State v. Wappenstein*, 121 Pac. 989; *State v. Duff*, 122 N. W. 829; *People v. Bright*, 96 N. E. 362; *People v. Chadwick*, 25 Pac. 737; *State v. Moxley*, 103 Pac. 665.)

The evidence of an accomplice must be corroborated only by such evidence as tends to connect the defendant with the commission of the offense. (*State v. Streeter*, 20 Nev. 403.)

The witnesses Biggins and Diehl were not accomplices of the defendant, and their testimony needed no corroboration. The rule for determining whether a witness is an accomplice where testimony needs corroboration is to determine whether or not he could have been indicted and convicted of the same crime. If he could not, then he

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is not an accomplice. (12 Cyc. 445-466, and authorities cited.) There is cited against this doctrine, the case of *People v. Coffey*, 119 Pac. 901. In the case of *State v. Wappenstein*, *supra*, the Supreme Court of Washington, in a case involving the same kind of a crime as in *People v. Coffey*, adheres to the prevailing rule as to who are accomplices, and supports the decisions with a long list of cases cited. The crime prohibited by section 6519 of the Revised Laws is nearly the same as the common-law crime of keeping a common gaming house. (*State v. Wakeley*, 117 Pac. 93; *Green v. Commonwealth*, 6 Ky. Law Rep. 217; *Schwartz v. State*, 40 S. W. 976.)

It is perfectly competent and proper for counsel to comment on the absence of testimony which would be of special value upon the question at issue, and counsel certainly have the right to refer to such omission. (*State v. Yardi*, 30 Kan. 221, 2 Pac. 161; *State v. Mims*, 36 Or. 315, 61 Pac. 888; *People v. Young*, 36 Pac. 770, 102 Cal. 411; *Jackson v. State*, 31 Tex. Crim. Rep. 342, 20 S. W. 921; *Hall v. State*, 22 S. W. 141; *Mayes v. State*, 33 Tex. Crim. Rep. 33, 24 S. W. 421; *Commonwealth v. McCabe*, 163 Mass. 98, 39 N. E. 77; *Commonwealth v. Clark*, 14 Gray, 367; *State v. Mathews*, 98 Mo. 125, 10 S. W. 144; *State v. Emory*, 12 Mo. App. 593; *State v. Jones*, 77 N. C. 520; *U. S. v. Chandler*, 65 Fed. 308; *State v. Castner*, 127 N. C. 566, 37 S. E. 326, 80 Am. St. Rep. 809.)

There was no error in the district attorney referring, in his closing argument, to the cost which would accrue to the taxpayers in the event that it became necessary to prosecute the defendant on another indictment. The record shows that the remarks made by the district attorney in that respect were in reply to an argument made by the defendant's attorney, and were provoked by remarks of the defendant's counsel. (*Dollar v. State*, 99 Ala. 236, 13 South. 575; *Woodruff v. State*, 61 Ark. 157, 32 S. W. 102; *People v. Philbon*, 71 Pac. 650, 138 Cal. 539; *People v. Rush*, 10 Pac. 169, 68 Cal. 623; *People v. Smith*, 106 Mich. 431, 64 N. W. 200.)

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Per Curiam:

The defendant was indicted by the grand jury of Humboldt County for the crime of knowingly permitting unlawful gambling in his place of business in Winnemucca. From a judgment of conviction and an order denying a motion for a new trial, he has appealed.

[1] It is urged that the case ought to be reversed on different grounds, first of which is the one that a grand juror was disqualified. His frame of mind is illustrated by the following extract from the testimony which he gave upon the motion to set aside the indictment:

A. Well, I don't know as I have any belief. I don't know that a man could form an opinion unless they had some tangible evidence. It was rumored, and of course I had the impression, that they were gambling, but I had no belief of the gambling until the men were put under oath. You can hear a rumor, but you cannot form an opinion upon a mere rumor. I had heard it stated several times that they were gambling or conducting a gambling place, but I never had heard until I got into the grand jury room that they were gambling—that he was gambling there. When I went into the grand jury room I had no idea that the case was coming up.

Q. Then you had no opinion one way or the other? A. I don't think I did until after we heard the evidence.

Q. You had no opinion on the 31st of January, before you were sworn as a grand juror, as to whether this man had been gambling or was running a gambling place?

A. I didn't have an opinion that I could come in and make any charge against him; I didn't have an opinion that I could have charged him with anything.

Q. I think I understand what you mean, but you will be fair with me, I know. Still you did have an opinion or belief about it—about this man—didn't you? A. Why, sure, I have had for some time, that there was something wrong there.

Q. And that belief or opinion, if it was such, was formed upon what you had heard? A. Yes, on rumors.

Q. And the persons who had informed you, you had no

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reason to disbelieve, did you? A. I couldn't recall any one, outside of that one evening, who spoke positively on the case. He didn't say that he had seen anything; he simply said it was an open secret.

Q. After that you considered it was an open secret, didn't you? A. I didn't pay any attention to it, Judge.

Q. You took it for what it was worth, and believed it, and let it go at that? A. I just took it for what it was worth and let it go. I would not want to injure Mr. Williams by saying that I had an opinion, or denying an opinion if I had one. I don't believe—I couldn't say that I had an opinion. I had the impression that there was gambling going on there, but I didn't trace it, and didn't try to trace it. Likely there is very few men in the county that has not heard the same thing.

There is nothing in this or the other evidence to indicate that he had a fixed or settled opinion regarding the guilt or innocence of the defendant, and such a prejudice or state of mind as tended to disqualify him as a grand or trial juror.

The sixth subdivision of section 7005 of the Revised Laws provides that an individual juror may be challenged on the ground: "That a state of mind exists on his part in reference to the case, or to either party, which will prevent him from acting impartially and without prejudice to the substantial rights of the party challenging; but no person shall be disqualified as a grand juror by reason of having formed or having expressed an opinion upon the matter or cause to be submitted to such jury, founded upon public rumor, statements in public journals, or common notoriety; *provided*, it satisfactorily appears to the court upon his declaration, under oath, or otherwise, that he will, notwithstanding such an opinion, act impartially and fairly upon the matters to be submitted to him."

The fact that a man hears rumors or statements and forms impressions from them, as every intelligent person may be expected to do, is far from sufficient to disqualify under this statutory provision and our practice.

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[2] It is also contended that the conviction cannot be sustained upon the uncorroborated evidence of witnesses who were allowed to play the unlawful game while the defendant was not one of the players. Section 7180 of the code provides that a conviction shall not be had on the testimony of an accomplice unless he is corroborated by other evidence which, in itself, tends to connect the defendant with the commission of the offense. On behalf of the state are cited cases tending to sustain the claim that the persons who actually play the game are not accomplices of the owner of the premises or the proprietor who permits the game to be played, and that a conviction can be sustained against him on the testimony of the player. As to whether, under that section, the witnesses who might be guilty of playing an unlawful game are accomplices of the proprietor who is guilty of the offense of allowing an unlawful game to be played on his premises, which may be considered a different crime, need not be determined, for we think there is sufficient corroborative evidence in the testimony of Lamb and Miller, witnesses who did not participate in the game.

The fact that other unlawful games, and that this game, as testified to by the participants and other witnesses, were carried on with the door locked and attended by the defendant's brother, although slight, may be sufficient to corroborate the evidence of an accomplice. The corroborating evidence here seems to be as strong as in the case of *State v. Streeter*, 20 Nev. 403, in which this court said that all the statute requires is that the circumstances should be such as to convince the jury and to make them believe that the accomplice had sworn truly, and that the charge was true, and, if the jury are satisfied with the weight of the corroborating circumstances, it is enough. (*State v. Lambert*, 9 Nev. 321.) This view also makes it unnecessary to determine regarding the objection to the instructions relating to accomplices. Evidence that the defendant permitted other unlawful games to be played on the premises was properly admitted to show his knowledge of, and consent to, the playing

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of this particular game. (*State v. McMahon*, 17 Nev. 375; *State v. Roberts*, 28 Nev. 375.)

[3] The district attorney, in his opening address to the jury, stated: "Why didn't the defendant call any witnesses to the stand? Why didn't he put his brother on the stand, his attendant? Why didn't he make a defense by calling witnesses to the stand, his brother, the attendant? I will tell you why; he didn't dare to do it." Counsel for the defendant, interrupting, said: "We desire at this time, so that the reporter may get it in the record, to state that the district attorney has commented on the failure of the defendant to take the stand in his own behalf, or to produce any witnesses on behalf of the defense, and we assign it as prejudicial error on his part, and ask the court to instruct the jury to disregard his remarks." The district attorney said: "I wish to deny that I made any allegation of that kind as to the defendant's failure to take the stand."

The state and federal constitutions provide that persons accused of crime shall not be compelled to testify against themselves, and the statute (section 7161) directs that "in all cases wherein the defendant in a criminal action declines to testify, the court shall specially instruct the jury that no inference of guilt is to be drawn against him for that cause."

It has been held error for a prosecuting attorney to argue to the jury that the defendant is guilty because he failed to testify. In this case the district attorney did not criticize or mention the failure of the defendant himself to testify, but his remarks appear to relate to his failure to put on the stand his brother, who apparently was in charge of the room where the game was played, or other witnesses. We think, under the circumstances, the language of the district attorney was not improper argument. Nor ordinarily are remarks of a prosecuting officer, provoked by or made in reply to statements of the attorney for the defendant, objectionable.

We conclude that the evidence is sufficient to sustain the conviction of the crime of knowingly permitting

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unlawful gambling. As some of the points involved were in doubt until given consideration, and there was an honest difference of opinion regarding them entertained by opposing counsel, we issued a writ of probable cause and stayed the execution, under section 7294, pending the determination of this appeal.

The judgment and order of the district court are affirmed.

[No. 1870]

McSTAY SUPPLY COMPANY (A CORPORATION),
RESPONDENT, v. CARL STODDARD, LYTTON
STODDARD, AND JOHN S. COOK & COMPANY
(A CORPORATION), APPELLANTS.

1. APPEAL AND ERROR—THEORY OF CAUSE—MISTAKEN REMEDY—
QUESTION FIRST RAISED ON APPEAL.

Where a suit was tried by both parties on the theory that it was in equity, defendant could not object for the first time on appeal that the complaint stated a cause of action at law and that plaintiff had mistaken his remedy which was in equity instead of at law.

2. ACTION—NATURE OF REMEDY—EQUITY OR LAW.

Plaintiff sued defendant banking company and the firm of S. Bros., alleging that the firm had collected certain funds as plaintiff's agent and had wrongfully deposited them in the firm account in defendant bank to which the firm was indebted, and that defendant bank, with knowledge of plaintiff's ownership of the money, wrongfully credited the same on the firm's debt, and refused on demand to pay the money to plaintiff, whereupon plaintiff prayed that it might be decreed to be the owner of the money, and that the bank be ordered to account therefor and pay it over. *Held*, that the facts alleged stated a cause of action in equity and not at law.

3. ELECTION OF REMEDIES—ACCOUNTING—CONVERSION.

Where the agent of plaintiff wrongfully deposited money collected to the credit of the agent's account in a bank, and the bank, with knowledge of plaintiff's ownership, credited the money on the agent's debt to it, the plaintiff could either sue the bank in equity of an accounting or else treat the funds as converted, and sue for damages at law.

4. APPEAL AND ERROR—FINDINGS BY TRIAL COURT—CONFLICTING
EVIDENCE—REVIEW.

Findings of fact on conflicting evidence will not be reversed on appeal.

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5. BANKS AND BANKING—RELATION BETWEEN BANK AND DEPOSITOR.

The relation between a bank and its depositor is that of debtor and creditor, so that the title to money deposited passes at once to the bank and becomes a part of its general assets.

6. BANKS AND BANKING—BANK'S LIEN.

A bank has a lien on all funds belonging to depositors deposited for any indebtedness owing to it by them.

7. BANKS AND BANKING—DEPOSITS BY AGENT—WITHDRAWAL—LIEN.

Where a principal permits his agent to deposit money in a bank without notice to the bank that the money belongs to the principal, and the agent checks out the money or subjects it to a lien on account of money borrowed from the bank, the loss is that of the principal and not of the bank.

8. BANKS AND BANKING—DEPOSIT—BANK'S LIEN—MONEY BELONGING TO DEPOSITOR'S PRINCIPAL.

Where a principal permits his agent to deposit money to the credit of the agent's account in a bank, and neglects to give notice of ownership of the money until the bank's lien has attached for an indebtedness due from the agent, a notice thereafter given is too late and will not affect the bank's right to apply the money to satisfy its lien.

9. BANKS AND BANKING—TRUST FUNDS—DEPOSIT BY AGENT—APPLICATION BY BANK.

Where an agent to collect and remit for claims belonging to plaintiff, without authority, deposited the proceeds of the collections to his deposit account in a bank to which he was indebted, plaintiff was the equitable owner of such proceeds, and the bank had no authority after notice to apply the same to the agent's debt to it.

APPEAL from the Seventh Judicial District Court, Esmeralda County, Nevada; *Theron Stevens*, Judge.

Action by the McStay Supply Company against John S. Cook & Co. Judgment for plaintiff, and defendant appeals. **Affirmed.**

The facts sufficiently appear in the opinion.

Bryant & O'Brien, C. L. Lyman, and Henry M. Hoyt, for Appellants:

The plaintiff has mistaken its remedy, and under the facts found by the court should have brought a suit in equity instead of an action at law. The theory upon which the court below gave judgment was that Stoddard Brothers were acting as trustees for the plaintiff in

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collecting the money for the goods sold and in depositing it in the banking house of John S. Cook & Company, and that the money being a trust fund, the plaintiff could follow it, even though it never had any notice that the money was the property of the McStay Supply Company. There is nothing in the complaint, direct or indirect, to indicate that it was intended as a suit in equity. The authorities are uniform that under the facts of a case of this kind the plaintiff has two remedies. He must either bring a bill in equity, or he must sue the bank for damages for conversion. The complaint in this case is neither the one nor the other. In an action of this kind the remedy is in equity and not at law. (*National Bank v. Life Ins. Co.*, 104 U. S. 54; *Winstandley v. Second National Bank*, 41 N. E. 957.)

On the other hand, if the plaintiff desired to bring an action at law he should not allege that the money was still in the bank, but should have alleged conversion, and then an action at law might have lain. (*Globe Savings Bank v. National Bank of Commerce*, 64 Neb. 413.)

Whether this case be treated as at law or in equity, there is a total failure of proof to support either. The only evidence introduced by the plaintiff consisted of the deposition of Carl Stoddard and the testimony of C. E. McStay. The record may be searched from cover to cover for any evidence which shows that Stoddard Brothers actually collected this money and deposited it with John S. Cook & Company. This being true, the plaintiff must fail to recover in any form against John S. Cook & Company.

Even though the plaintiff had filed a proper bill in equity and had proved the facts set forth in the opinion of the court and in the findings of fact, then, under the law, the plaintiff would not be entitled to recover either at law or in equity.

The relation between a bank and its depositors is that of debtor and creditor. Money deposited in a bank becomes part of its general assets and the bank simply becomes a debtor of the depositor. The absolute title to the money

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by the mere act of deposit passes to the bank. (3 Am. & Eng. Ency. 827; *Bank of Marysville v. Brewing Co.*, 50 Ohio St. 151.)

The bank has a lien upon all funds deposited for any indebtedness owing to it by the depositors. (2 Bolles, *Modern Law of Banking*, 740; 3 Am. & Eng. Ency. 828; 1 Morse on Banks and Banking, sec. 324; *National Bank v. Insurance Co.*, 104 U. S. 54.)

If a principal permits his agent to deposit money in the bank without any notice to the bank that the money belongs to the principal, and the agent checks out the money or subjects it to a lien, on account of any borrowing of money, then the principal, and not the bank, is the loser. This is the crucial proposition in the case at bar, because the facts most favorably construed to the plaintiff bring it clearly within this rule. All that the plaintiff can possibly claim is that Stoddard Brothers, acting as agents of the plaintiff, collected the plaintiff's money and deposited it with John S. Cook & Company to their own account. At the time the deposit was made Stoddard Brothers personally owed John S. Cook & Company twelve thousand dollars. (*Bank of New South Wales v. Goldburn*, 87 Law Times Rep. 88; *Holley v. Domestic Missionary Society*, 180 U. S. 284; *Bank of Metropolis v. New England Bank*, 1 How. 234; *Sweeney v. Easter*, 1 Wall. 166; *School District v. First National Bank*, 102 Mass. 174; *Wood v. Boylston National Bank*, 129 Mass. 358; *Globe Savings Bank v. National Bank of Commerce*, 64 Neb. 413; *Justh v. National Bank of Commonwealth*, 56 N. Y. 478; *Goshen Bank v. State*, 141 N. Y. 379; *Hatch v. National Bank*, 147 N. Y. 185; *Sparrow v. State Exchange Bank*, 103 Mo. App. 338; *Smith v. Crawford County Bank*, 99 Iowa, 282; *Munnerlyn v. Augusta*, 88 Ga. 333; *First National Bank v. Valley State Bank*, 57 Pac. 510; *Smith v. Des Moines National Bank*, 78 N. W. 238; *Wyman v. Colorado National Bank*, 5 Colo, 30; *People v. St. Nicholas Bank*, 60 N. Y. Supp. 719; *Hemp-hill v. Yerkes*, 132 Pa. St. 545; *Twohy v. Melbye*, 78 Minn. 357; *Kimmel v. Bean*, 75 Pac. 1118.)

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The one case which denies this general proposition is that of *Cady v. Omaha National Bank*, 46 Neb. 756. The Supreme Court of Kansas expressly refused to follow that case and criticizes it. (*Kimmel v. Bean*, 75 Pac. 1118.) We think that it is practically overruled by a later case in Nebraska—*Globe Savings Bank v. National Bank of Commerce*, 64 Neb. 413.

If the principal neglects to give a notice until the bank's lien has attached, then a notice comes too late and the bank has a right to apply the money to satisfy its lien. The only notice that is attempted to be proved in this case was given not earlier than the 10th of September, long after the Stoddard Brothers had become indebted to the bank and after they had deposited to their credit the money which is now claimed by the plaintiff. (*School District v. First National Bank*, 102 Mass. 174; *People v. St. Nicholas Bank, In re Dunn*, 60 N. Y. Supp. 719; *Joyce v. Auten*, 179 U. S. 591; *Cockrill v. Joyce*, 62 Ark. 216; *Kelly v. Phelan*, 5 Dill. 288; 1 Jones on Liens, 241.)

Robert L. Hubbard, for Respondent:

Counsel for appellant complains that the plaintiff has mistaken its remedy and under the facts found by the court should have brought a suit in equity instead of an action at law. No such question was presented to the court below, but is here presented for the first time.

The case was tried upon the theory and understanding by defendant's counsel that it was a suit in equity. However, had this question been presented to the district court, it would then have been, as it is now, without merit. (Comp. Laws, 3096; 1 Est. Pl. 179; *National Bank v. Gillespie*, 34 L. Ed. 724; *National Bank v. Insurance Co.*, 26 L. Ed. 693; *Boyle v. Northwestern National Bank of Superior*, 1 L. R. A. 1110.)

Appellant's contention that "there is a total failure of proof to establish the allegation of the complaint in the case, either at law or in equity" is certainly without force. There being a substantial conflict of evidence, and the

evidence of Stoddard in behalf of the plaintiff being corroborated by the circumstances and evidence, coupled with the fact that Stoddard did not give a check to the bank for the balance of the indebtedness of Stoddard Brothers, completely justified the court below in resolving the conflict of evidence in favor of the plaintiff. This the court did, and under the rules of practice in this state the finding will not be disturbed.

A banker's lien attaches only to the funds belonging to the depositor, and not to funds belonging to others than the depositor. (3 Am. & Eng. Ency. Law, 2d ed. 836; *Farmers Bank v. Farwell*, 58 Fed. 633; *National Bank v. Life Insurance Co.*, 26 L. Ed. 701; 5 Cyc. 550; *Falkland v. St. Nicholas Bank*, 84 N. Y. 145; 2 Pom. Eq. Jur. 622; *Swift v. Williams*, 11 Atl. 838; *Burnett v. National Bank of Corunna*, 38 Mich. 630.)

It must also be remembered that the right of banker's lien was an affirmative defense pleaded by the bank and the burden is upon it to show that the funds belonged to Stoddard Brothers. (84 N. Y. 145, *supra*.)

Nor does the mere act of charging the deposit account with the whole or part of the depositor's debt to the bank at all affect the right of the beneficial owner to follow the fund as a trust fund. (*Loeb v. Peters*, 35 Am. Rep. 17; *Phoenix Insurance Co. v. Church*, 37 Am. Rep. 494.)

In a case like the one before the court the rights of plaintiff to follow the trust funds would still be perfect, even though the bank had no notice whatever, either actual or constructive. (*Swift v. Williams*, 11 Atl. 835; *Burnett v. First National Bank of Corunna*, 38 Mich. 630; *Bank v. King*, 57 Pa. 202; *National Bank v. Life Insurance Co.*, 26 L. Ed. 693; *Foster v. Rincker*, 35 Pac. 470; *Boyle v. National Bank*, 1 L. R. A. 1110; *American T. & B. Co. v. Boone*, 40 L. R. A. 250; *Bank v. Hummel*, 23 Pac. 986; *Gerard v. McCormick*, 14 L. R. A. 234; *Cragie v. Hadley*, 1 N. E. 537.)

The Cook bank is bound with notice of the relations between Stoddard Brothers and McStay Supply Company by and through the conversation between McStay of the

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plaintiff corporation and I. J. Gay, assistant cashier of defendant bank, in charge during the absence of the cashier. (*Thompson v. Gloucester City Savings Inst.*, 8 Atl. 97; *Van Alen v. Bank*, 52 N. Y. 1; *Harrison v. Smith*, 83 Mo. 210; *San Diego County v. California National Bank*, 52 Fed. 59; *Smith v. Combs*, 24 Atl. 9; *McLeod v. Evans*, 28 N. W. 173; *Importers and Traders Bank v. Peters*, 25 N. E. 319; *Davenport Plow Co. v. Lamp*, 45 N. W. 1049; *Cady v. South Omaha Nat. Bank*, 46 Neb. 658, 65 N. W. 906.)

By the Court, SWEENEY, C. J.:

The record discloses that plaintiff, respondent herein, is a California corporation; that the defendant banking company is a Nevada corporation; that the defendants Stoddard were copartners doing business in Goldfield in carrying on a warehouse, storage, and transfer or drayage business; that plaintiff sold and shipped merchandise to purchasers in Goldfield; that defendants Stoddard hauled and delivered said goods to said purchasers; that the defendants Stoddard collected for plaintiff from such customers \$2,653.62; that the money so collected was the property of the plaintiff, and was collected for the sole purpose of payment and delivery to plaintiff; that the defendants Stoddard without right or authority and wrongfully deposited the money collected in the defendant bank to their own credit on or about September 10, 1907, while the money was the property of the plaintiff; that the money so deposited remained in defendant bank, was in defendant bank when suit was brought, and was the money of the plaintiff; that plaintiff demanded the money of defendant bank; that defendant bank refused to pay over the same; that plaintiff first learned that the bank had its money on September 23, 1907.

Upon this state of facts plaintiff asked to be decreed to be the owner of the \$2,653.62 so deposited by the defendants Stoddard in the defendant bank; that the defendant bank be decreed to pay over and deliver said money to plaintiff; for costs and for full relief.

To the complaint in the action defendants Stoddard made no defense. The defendant bank took no exceptions by demurrer or otherwise to the complaint, but filed an answer in which it specifically admitted its own corporate existence; the copartnership of the defendants Stoddard, and that they were engaged in and carrying on a warehouse, storage, and transfer or drayage business; that they had an account with defendant bank in the name of Stoddard Bros.; and, by failure to sufficiently or at all deny all or any of the remaining allegations of the plaintiff's complaint, admitted the whole thereof.

For an affirmative defense defendant bank alleged that it was a banking corporation doing a general banking business; that prior to the bringing of the suit Stoddard Bros. as copartners kept an account in defendant bank; that money was deposited by Stoddard Bros. in said account; that the money so deposited in said account was the property of Stoddard Bros.; that Stoddard Bros. borrowed various sums of money from the bank and gave their note before plaintiff's goods were shipped; that on September 13, Stoddard Bros. failed, owing defendant bank; that at the time of failure they had a balance to their credit of about \$3,200; that the defendant bank credited said balance against the indebtedness of Stoddard Bros. to the defendant bank; that said charge of said balance against said indebtedness closed the business between Stoddard Bros. and the bank, so far as the account was concerned; that defendant bank never knew or had any knowledge or notice that any sums of money deposited to the credit of the said Stoddard Bros. were the property of the plaintiff or any one else.

Upon this complaint and answer the cause was tried by the court, without a jury, and the court found as matters of fact and as conclusions of law as follows: That on August 10, 1907, plaintiff sold to purchasers at Goldfield, merchandise of the value of \$2,653.62; that Carl and Lytton Stoddard were copartners as Stoddard Bros.; that they were doing a general transfer

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or drayage business in Goldfield; that Stoddard Bros. hauled all of said goods and merchandise from the railway freight depot in Goldfield and delivered said merchandise to said purchasers; that Stoddard Bros. collected from the purchasers the value of said goods aggregating \$2,653.62; that Stoddard Bros. wrongfully deposited said money in defendant bank to their own credit; that the money so deposited was the property of the plaintiff; that the \$2,653.62 so deposited remained in said bank from the time of deposit to the date of trial, and that the plaintiff is still the owner; that plaintiff demanded the said moneys of the defendant bank; that defendant bank refused to pay or deliver said money to plaintiff; that on September 13 defendant bank credited Stoddard Bros. upon their indebtedness to the bank with the amount of their balance; that Stoddard Bros. never authorized or consented to such application of the moneys to the payment and discharge of their debt to the bank; that prior to such application of said moneys to said indebtedness, the defendant bank had actual knowledge and notice that plaintiff was the owner of \$2,653.62 of the balance in the account of Stoddard Bros.; that Stoddard Bros. claimed no right or title in or to any of said moneys; that previous to shipping the goods, and previous to the delivery thereof and the collection of the value thereof, and previous to the deposit of said moneys in said bank, C. E. McStay, an officer of the plaintiff, had a conversation with I. J. Gay, assistant cashier of the defendant bank, in charge of the bank, at the place of business of defendant bank; that said McStay made inquiry of said bank, through its said assistant cashier, as to the general standing and trustworthiness of said Stoddard Bros.; that said Gay told said McStay that the business relations of said Stoddard Bros. with said bank were satisfactory; that at that time Stoddard Bros. owed the bank \$12,000; that between the date of said conversation and the closing of Stoddard Bros.' account said indebtedness had

been reduced, and no additional credit had been extended to Stoddard Bros. by said bank; that, by taking plaintiff's money to pay the debt of Stoddard Bros., defendant bank would gain and plaintiff would lose; that the allegations of plaintiff's complaint are true; that the relation existing between plaintiff and Stoddard Bros. was that of principal and agent; that it was the duty of Stoddard Bros. to remit the said money to the plaintiff, but that in violation of plaintiff's rights Stoddard Bros. wrongfully deposited said money in said bank in their own name; that the deposit was wrongful; that the depositor had no right or title in or to the money; that the bank acquired no right or title therein or thereto; that the same was a trust fund, and so remained in the hands of the bank; that the plaintiff was the beneficial owner; that the bank had no right to appropriate the same to the debt of Stoddard Bros.; that the bank had notice of the beneficial ownership of plaintiff; that plaintiff is entitled to the money, and was entitled to the same on September 13, 1907; that the attempt of the bank to pay Stoddard Bros.' debt to it with plaintiff's money was wrongful and without right, title, or authority; that Stoddard Bros. never authorized the bank's action; that plaintiff in no manner ever consented thereto; that to permit the bank to retain said money would result in benefiting the bank and injuring the plaintiff by the wrongful act of the agent and the unauthorized seizure by the bank; that to require the bank to restore the property of plaintiff to it will not deprive the bank of anything belonging to it, and plaintiff will receive only that which it is entitled to; that plaintiff is entitled to interest from September 25, 1907, in addition to the original and principal trust fund of \$2,653.62.

In rendering its decision the lower court made use of the following language: "To this complaint an answer was filed, which is insufficient to raise an issue on any of the allegations of the complaint, except that it denies that the defendant bank had, at any time, any moneys

belonging to the plaintiff which it failed to deliver upon demand. To many allegations of the complaint no denials are made; to others a general denial is interposed, which amounts to nothing." Because of the use of that language counsel for defendant bank asked leave of the court to file an amended answer for the sole purpose of making their denials sufficient in form to raise the issues, and leave was granted for such purpose. Pursuant to such permission defendant bank filed an amended answer, and the same was considered by the court on motion for a new trial, and it is proper to say that the case was tried on the answer, and denials assumed to be sufficient. All this with respect to the amended answer was permitted by the court notwithstanding the fact that in the opening of the trial counsel for plaintiff called the attention of the court and counsel for the defendant bank to the form of the denials and their insufficiency, and counsel for the bank thereafter proceeded to trial without amendment, insisting that the denials were sufficient.

It is asserted by appellant that the trial court erred for the three following reasons:

"First—The plaintiff has mistaken its remedy, and under the facts found by the court should have brought a suit in equity instead of an action at law.

"Second—There is a total failure of proof to establish the allegations of the complaint in the case, either at law or in equity.

"Third—Even though the plaintiff had filed a proper bill in equity and had proved the facts set forth in the opinion of the court and in the findings of fact, then, under the law, the plaintiff would not be entitled to recover either at law or in equity."

Our civil practice act provides: "There shall be in this state but one form of civil action for the enforcement or protection of private rights, and for the redress or prevention of private wrongs." (Rev. Laws, 4943.)

"The pleader is required to state the facts which constitute his cause of action; and whatever relief those facts, being established, may entitle him to, he will

obtain, whether legal or equitable, or both, or whether they would have made a case in assumpsit, debt, case or other form of common-law action." (Est. Pl. vol. 1, sec. 179.)

[1] The record discloses that the question of a mistaken remedy is raised here for the first time and was not asserted in the lower court, and that the case was tried upon the theory and understanding of both parties that it was a suit in equity. Under this state of circumstances appellant is now in no position to successfully complain at this stage of the proceedings.

[2] An examination of the complaint, however, will disclose, we believe, that the action was of an equitable nature. Among other things the complaint alleges: "The relation between plaintiff and Stoddard Bros. was that of principal and agent; that the agent collected certain moneys belonging to the principal with no other rights therein or power thereover than to remit the same to the principal; that the agent wrongfully and without right or authority deposited the principal's money in the defendant bank to his own account; that the money so wrongfully deposited remained in defendant bank up to the time of suit; that the principal, plaintiff here, demanded its money of defendant bank; that defendant bank refused to pay it over. And prays that it might be decreed to be the owner of the moneys and that the defendant bank be decreed and ordered to pay it over."

In the case of *National Bank v. Gillespie*, 137 U. S. 411, 11 Sup. Ct. 118, 34 L. Ed. 724, the court said: "Two questions are presented, one of right, the other of jurisdiction. Ought the bank to be compelled to pay the Gillespies such sum of money? And had a court of equity jurisdiction to entertain and render a decree in this suit? In respect to the first question, it may be premised that the Gillespies were the owners of certain cattle, which were consigned to the firm of Rappal Sons & Co. for sale; that the proceeds of the sales made by the Rappals were deposited in the bank; and it is for this money that the suit was brought. This general statement compels the

equitable conclusion that, as the Gillespies owned the cattle, they ought to have the moneys received from their sale. The right of an owner of property is not limited to the property itself, but extends to everything which is its direct product or proceeds. * * * As the claim of the Gillespies against the bank was equitable purely, equity alone had jurisdiction. We conclude, therefore, that the proper forum was sought."

In *National Bank v. Insurance Company*, 104 U. S. 54, 26 L. Ed. 693, the following language is used: "Although the relation between a bank and its depositor is that merely of debtor and creditor, if the money deposited belongs to a third person and was held by the depositor in a fiduciary capacity, its character is not changed by being placed to its credit in his bank account."

See, also, *Boyle v. Northwestern National Bank of Superior*, 125 Wis. 498, 103 N. W. 1123, 104 N. W. 917, 1 L. R. A. (N. S.) 1110, 110 Am. St. Rep. 844.

[3] We believe an examination of the authorities will disclose that one may sue in equity or treat the fund as converted and secure damages in law against the bank, if, as a matter of fact, the transaction amounted to a conversion; but where it is properly pleaded and proven that the money belonged to the plaintiff and never was the property of the debtor depositor, and the bank was so aware before any application of the deposit, any attempt of the bank thereafter to apply said fund to the debt of the depositor under such circumstances is futile, and the bank cannot avoid accounting to the legal owner thereof for the misapplication of the fund. In the present case the money belonged to the plaintiff and was never the property of the debtor depositor, and the attempt of the bank to apply the fund to the debt of the depositor amounted to nothing and left the account just as it was before such attempt. (3 Am. & Eng. Ency. Law, 2d ed. 836; *Farmers Bank v. Farwell*, 58 Fed. 633, 7 C. C. A. 391.)

[4] An examination of the pleadings and transcript, after due consideration, convinces us that there is such a substantial conflict in the evidence that we would not be

justified in disturbing the findings of fact as made by the lower court, as we believe that the allegations of the complaint were sufficiently established to sustain the judgment. (*Botsford v. Van Riper*, 33 Nev. 156.)

An examination of the authorities will disclose that as a matter of law the following principles affecting the relations of a bank and its depositors as may be involved in this case are established by an overwhelming weight of authority:

[5] First—The relation between a bank and its depositors is that of debtor and creditor. There can be no doubt of this proposition. Money deposited in a bank becomes part of its general assets, and the bank simply becomes a debtor of the depositor. The absolute title to the money by the mere act of deposit passes to the bank. (5 Cyc. 607; 3 Am. & Eng. Ency. Law, 827; *Bank of Marysville v. Brewing Co.*, 50 Ohio St. 151, 33 N. E. 1054, 40 Am. St. Rep. 660.)

[6] Second—The bank has a lien upon all the funds belonging to depositors deposited for any indebtedness owing to it by the depositors. (2 Bolles, *Modern Law of Banking*, 740; 3 Am. & Eng. Ency. Law, 828; 1 Morse, *Banks and Banking*, 324; *National Bank v. Insurance Co.*, 104 U. S. 54, 26 L. Ed. 693.)

[7] Third—If a principal permits his agent to deposit money in the bank without any notice to the bank that the money belongs to the principal, and the agent checks out the money or subjects it to a lien, on account of any borrowing of money, then the principal and not the bank is the loser. (*Thomson v. Clydesdale Bank, Limited*, Appeal Cases 1893, 282; *Bank of New South Wales v. Goldburn*, 87 Law Times Rep. 88; *Holly v. Domestic Missionary Society*, 180 U. S. 284, 21 Sup. Ct. 395, 45 L. Ed. 531; *National Bank v. Insurance Co.*, 104 U. S. 54, 26 L. Ed. 693; *Bank of Metropolis v. New England Bank*, 1 How. 234, 11 L. Ed. 115; *Sweeney v. Easter*, 1 Wall. 166, 17 L. Ed. 681; *School District in Greenfield v. First National Bank*, 102 Mass. 174; *Wood v. Boylston National Bank*, 129 Mass. 358, 37 Am. Rep. 366; *Globe Savings*

Bank v. National Bank of Commerce, 64 Neb. 413, 89 N. W. 1030; *Justh v. National Bank of Commerce*, 56 N. Y. 478; *Goshen Bank v. State*, 141 N. Y. 379, 36 N. E. 316; *Hatch v. National Bank*, 147 N. Y. 185, 41 N. E. 403; *Sparrow v. State Exchange Bank*, 103 Mo. App. 338, 77 S. W. 168; *Smith v. Crawford County Bank*, 99 Iowa, 282, 61 N. W. 378, 68 N. W. 690; *Munnerlyn v. Augusta*, 88 Ga. 333, 14 S. E. 554, 30 Am. St. Rep. 159; *First National Bank v. Valley State Bank*, 60 Kan. 621, 57 Pac. 510; *Kimmel v. Bean*, 68 Kan. 598, 75 Pac. 1118, 64 L. R. A. 785, 104 Am. St. Rep. 415; *Smith v. Des Moines National Bank*, 107 Iowa, 620, 78 N. W. 238; *Wyman v. Colorado National Bank*, 5 Colo. 30, 40 Am. Rep. 133; *People v. St. Nicholas Bank*, 44 App. Div. 313, 60 N. Y. Supp. 719; *Hemphill v. Yerkes*, 132 Pa. 545, 19 Atl. 342, 19 Am. St. Rep. 607; *Twohy v. Melbye*, 78 Minn. 357, 81 N. W. 20.)

[8] Fourth—If the principal neglects to give a notice until the bank's lien has attached, then a notice comes too late, and the bank has a right to apply the money to satisfy its lien. (*School District v. First National Bank*, 102 Mass. 174; *People v. St. Nicholas Bank, In re Dunn, et al.*, 44 App. Div. 313, 60 N. Y. Supp. 713, 723; *Joyce v. Auten*, 179 U. S. 591, 21 Sup. Ct. 227, 45 L. Ed. 332; *Cockrill v. Joyce*, 62 Ark. 216, 35 S. W. 221; *Kelly v. Phelan*, 5 Dill. 228, Fed. Cas. No. 7,673; *Jones on Liens*, vol. 1, 241.)

[9] But where, as in the present case, trust funds or securities belonging to others are deposited by a depositor with a bank, and the bank has knowledge of the fact that these funds do not belong to the depositor and that he is merely acting as a collector or agent of another, the bank has no right whatever to apply said funds or securities to any indebtedness of the depositor, nor can the bank acquire any lien upon such funds or securities so deposited by a depositor who may be indebted to the bank.

The Supreme Court of the United States, in *Union Stock Yards National Bank v. Gillespie*, 137 U. S. 411,

11 Sup. Ct. 118, 34 L. Ed. 724, speaking through Brewer, J., in passing on a case with principles involved almost identical with the same at issue in the present case, rightly expressed the law bearing upon these issues when in effect it said: "A bank which knows that a person having an account with it is a factor or agent to sell for others on commission, and is not a buyer or seller for himself, and that he is failing in business cannot take the money proceeds of sales by the factor deposited with the bank and apply it to the payment of the individual debt of the factor. One who takes from a factor, in payment of his debt, moneys which he knows equitably belong to the factor's consignor and principal must account to the principal for such moneys. Where the title to moneys deposited in a bank is equitable rather than legal, the owner of the equitable title may maintain a suit in equity against the bank to enforce his equitable right to the moneys; his remedy is not at law." (*National Bank v. Life Insurance Co.*, 104 U. S. 54, 26 L. Ed. 701; 5 Cyc. 550, 551, 552; *Falkland v. St. Nicholas Bank*, 84 N. Y. 145; *Swift v. Williams*, 68 Md. 236, 11 Atl. 835; Digest of National Bank Decisions, p. 196, sec. 1; *Loeb v. Peters*, 63 Ala. 243, 35 Am. Rep. 17; *Phoenix Insurance Co. v. Church*, 81 N. Y. 218, 37 Am. Rep. 494; *Potts v. Mayer*, 74 N. Y. 594; *Burnett v. First National Bank of Corunna*, 38 Mich. 630; *Foster v. Rincker*, 4 Wyo. 484, 35 Pac. 470; *Boyle v. National Bank*, 125 Wis. 498, 103 N. W. 1123, 104 N. W. 917, 1 L. R. A., N. S., 1110, 110 Am. St. Rep. 844; *American T. & B. Co. v. Boone*, 102 Ga. 202, 29 S. E. 182, 40 L. R. A. 250, 66 Am. St. Rep. 167; *Myers v. Board of Education*, 51 Kan. 87, 32 Pac. 658, 37 Am. St. Rep. 263; *Bank v. Hummel*, 14 Colo. 259, 23 Pac. 986, 8 L. R. A. 788, 20 Am. St. Rep. 257; *Bank v. Walker*, 130 U. S. 267, 9 Sup. Ct. 519, 32 L. Ed. 959; *Gerard v. McCormick*, 130 N. Y. 261, 29 N. E. 115, 14 L. R. A. 234; *Van Alen v. Bank*, 52 N. Y. 1; *Harrison v. Smith*, 83 Mo. 210, 53 Am. Rep. 571; *San Diego County v. California National Bank*, 52 Fed. 59; *Smith v. Combs*, 49 N. J. Eq. 420, 24

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Atl. 9; *Importers' and Traders' Bank v. Peters*, 123 N. Y. 272, 25 N. E. 319; *Davenport Plow Co. v. Lamp*, 80 Iowa, 722, 45 N. W. 1049, 20 Am. St. Rep. 442; *Cady v. South Omaha Nat. Bank*, 46 Neb. 756, 65 N. W. 906.)

After a careful review of the evidence and the law applicable thereto, we are of the opinion that the record discloses no substantial prejudicial error to have been committed; the judgment is affirmed.

It is so ordered.

[No. 1949]

STATE OF NEVADA, EX REL. GEORGE SPRINGMEYER, RELATOR, v. CLEVELAND H. BAKER, RESPONDENT.

[No. 1950]

STATE OF NEVADA, EX REL. JOHN W. LEGATE, RELATOR, v. JOE JOSEPHS, RESPONDENT.

1. QUO WARRANTO—ELECTION CONTESTS—JURISDICTION.

The court has jurisdiction to allow a writ of *quo warranto* on the relation of a defeated candidate for a state office to contest the election.

2. QUO WARRANTO — CONTESTS — APPOINTMENT OF COMMISSIONER — JURISDICTION OF COURT.

Under Comp. Laws, 3279, 3280, authorizing the court to direct a reference when necessary for the information of the court, etc., the court, in *quo warranto* to contest an election to a state office, has jurisdiction to appoint a commissioner to count the undisputed ballots and report to the court for its information the actual ballots in dispute as well as the fact and number of undisputed ballots.

3. ELECTIONS — COMPENSATION OF COMMISSIONER APPOINTED BY COURT.

The compensation due the commissioner, appointed by the supreme court in an election contest to count the ballots which are undisputed and report the actual ballots in dispute, may be taxed as costs against the defeated party; but the court may not order relator to pay the costs in advance, though the commissioner may withhold his report until payment is made by the party calling for it, and any compensation advanced by either party to receive and use the report will be recovered as other costs from the losing party.

4. COSTS—RECOVERY—STATUTORY PROVISIONS.

Costs are recoverable only by express statutory provisions.

Points decided

5. CLERKS OF COURTS—COSTS IN SUPREME COURT—STATUTORY PROVISIONS.

The fees of the clerk of the supreme court prescribed by Comp. Laws, 2469, allowing a fee for entering any motion, rule, or order, and a fee for filing each paper, are limited to orders and motions defined by section 3586, providing that every direction of the court made or entered in writing and not included in the judgment is an order, and an application for an order is a motion, and an offer of or objection to evidence, or a ruling admitting or rejecting evidence, or the routine adjournment of the trial, is not a motion and order, and the clerk may not recover fees therefor.

6. COSTS—LIABILITY—PRIMARY LIABILITY.

Each party to an appeal or proceeding in the supreme court is primarily liable for the costs made by him, and there is no statutory authority for the charging to relator or appellant, or requiring the payment by them before judgment, of fees incurred by respondent.

7. COSTS—COSTS IN SUPREME COURT.

Where costs are incurred on both sides on appeal or original proceeding, the clerk must collect his costs in advance from the respective parties incurring them.

8. CLERKS OF COURTS—COSTS IN SUPREME COURT—FEES OF CLERK.

The clerk of the supreme court in an original proceeding must on request issue subpoenas, and fees therefor will be disallowed unless the party against whom the charge is made applied for and obtained a written order for the subpoenas.

9. ELECTIONS—CONTESTS—BALLOTS AS EXHIBITS.

A party to an election contest may attach all ballots in the same precinct to which he objects and have them filed as one exhibit, but the ballots of each precinct should be kept entirely separate.

10. ELECTIONS—BALLOTS—MARKING BALLOTS.

Under Rev. Laws, 1858, providing that when a voter marks more names than there are persons to be elected to office, or where it is impossible to determine his choice for any office, his vote for the office shall not be counted, a ballot containing a cross after the names of the candidates for the same office cannot be counted for either.

11. ELECTIONS—BALLOTS—MARKING BALLOTS.

Under Rev. Laws, 1852, which provides that the voter shall prepare his ballot by stamping a cross in the square, and in no other place, after the name of the person for whom he intends to vote, the cross must be in the square after the name of the candidate, and a ballot with a cross after the name of the candidate and before the square is invalid.

12. ELECTIONS—BALLOTS—MARKING BALLOTS.

Under Rev. Laws, 1852, which provides that in case of a constitutional amendment submitted the cross shall be placed after the answer which the voter desires to give, the cross in

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voting for or against a constitutional amendment need not be placed in the square, and a ballot with a cross before the square and after the word "Yes" or "No" in voting on a constitutional amendment is valid, as is also a ballot in which a single cross is placed in the square.

13. ELECTIONS—BALLOTS—MARKING BALLOTS.

A ballot containing a cross placed in the square and another cross placed before the square and after the word "Yes" or "No" in voting on a constitutional amendment must be rejected because of the extra cross.

14. ELECTIONS—BALLOTS—MARKING BALLOTS.

Under Rev. Laws, 1858, providing that any ballot on which appears names or marks excepting as provided for shall not be counted, a ballot containing a cross in the square following a blank space left for filling in the name of a candidate for an office for which no candidate has been nominated, or containing the name of a candidate written by the voter, must be rejected.

15. ELECTIONS—BALLOTS—MARKING BALLOTS.

Ballots containing crosses made with lead pencil or pen, or by marking with the wrong end of the stamp, must be rejected.

16. ELECTIONS—BALLOTS—MARKING BALLOTS.

A ballot containing an erasure destroying the texture of the paper, or containing holes rubbed or torn through the paper by the voter, must be rejected.

17. ELECTIONS—BALLOTS—MARKING BALLOTS.

A ballot containing marks other than those required for voting, apparently designed for identification, or which may be readily used for that purpose, will not be counted.

18. ELECTIONS—BALLOTS—FAILURE TO TEAR OFF NUMBER.

A ballot from which the number has not been torn by the election officers is valid.

ORIGINAL PROCEEDINGS in *quo warranto* by the State, on the relation of George Springmeyer, against Cleveland H. Baker, and by the State, on the relation of J. W. Legate, against Joe Josephs, to contest elections to the offices of Attorney-General and Clerk of the Supreme Court, respectively.

Proceeding on relation of George Springmeyer dismissed, and judgment for respondent Joe Josephs.

The facts sufficiently appear in the opinion.

George Springmeyer, for Relators:

On Demurrer: These proceedings have been so instituted as to give the court jurisdiction. *State v.*

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Sadler, 25 Nev. 165, is decisive of this question. See, also, *State v. Stewart*, 32 Mo. 379; *Toncray v. Bridge*, 95 Pac. 26; 32 Cyc. 1433.

The complaint states facts sufficient to constitute a cause of action. (High, Extra. Leg. Rem. 710; McCrary on Elections, 398, 405; *Kirk v. Rhodes*, 46 Cal. 398; *Davis v. State*, 75 Tex. 420, 12 S. W. 957; *Schneider v. Bray*, 22 Nev. 272.)

On Costs: A bond cannot be required of relators. Section 3583 of the Compiled Laws does not apply. See 47 Wis. 239. Only written motions may be charged for as costs. (*Blount v. Com.*, 120 N. C. 19, 26 S. E. 649; *Shed v. Ry. Co.*, 67 Mo. 687.)

Court Commissioner: It is clear from the order that the commissioner is merely an assistant to the court or clerk for the performance of ministerial duties of a clerical nature, and that in no sense has he judicial powers or functions.

He is not in any sense a judicial referee, chancellor, commissioner, or the like, and he is not to be compensated as such. (24 Am. & Eng. Ency. Law, 219, and authorities; 24 Cyc. 774, and authorities.)

It is submitted, therefore, that the commissioner is a mere clerical assistant to the court and that he is to be compensated in the same manner as would a clerk, bailiff, or other person appointed by the court in the absence of a statutory provision. (*In re Green*, 40 Mo. 91; *State v. Commissioners*, 120 N. C. 19, 26 S. E. 649, and other authorities cited in relator's brief in the clerk's matter.)

There being no statute whatever upon the subject, nor any rule of court or principle of practice from which the duty to impose the costs of the commissioner upon the parties can be inferred, it is believed that the parties litigant are not liable for them. That no statute provides that the state shall pay the compensation of the commissioner, is a matter of indifference to this court. The underlying principle, appertaining as well to a commissioner to count ballots as to other persons and things, has been announced by decisions of this court as well as by

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numerous other courts. (*State v. Davis*, 26 Nev. 373, 68 Pac. 689; *White v. Hughes Co.*, 9 S. D. 12, 67 S. W. 855; *State v. Cunningham*, 39 Mont. 165, 101 Pac. 962; *U. S. v. Swift*, 139 Fed. 225; *Stevenson v. Milwaukee Co.*, 140 Wis. 14, 121 N. W. 654.)

Not one of the cases cited, nor any other, put the expense upon the litigants unless there was an express statutory provision. It should not be forgotten that the state, rather than the litigants, is benefited by the work of the commissioner, for through his appointment the state is enabled to have the court attend to other duties, while the litigants are indifferent whether the commissioner or anyone else does the administrative work.

Cleveland H. Baker, Key Pittman, and James R. Judge,
for Respondents:

On Demurrer: The legislature, in section 3415 of the Compiled Laws, imposed on the attorney-general the duty of bringing the action therein provided for, whenever he has reason to believe the cause therefor named in the statute exists, or when he is directed so to do by the governor.

The designation by the legislature of the persons or officers, both of them being officers and members of the executive department of the state government, whose duty it shall be to determine whether, in the first instance, such office or franchise has been usurped, intruded into, or is unlawfully held by any person, would seem to indicate quite clearly an intention on the part of the legislature to impose upon the officers named the duty and the right to determine that question. Nothing contained in the statute, we believe, can be construed authorizing or intended to authorize a grant or imposition of that duty upon the judicial department of the state government, or upon any court thereof. (*State R. R. Commission v. People*, 98 Pac. 7; *West v. Martin*, 92 Pac. 334; *Gray v. Hawes*, 8 Cal. 562.)

Election contests are, in many of the states, purely statutory, and in the absence of such statute there can be

Argument for Respondents

no such contest. (*State, ex rel. Francis, v. Dillon*, 87 Mo. 487; *State, ex rel. Elkin*, 130 Mo. 90; *Pearson v. Alverson*, 49 South. 756.)

The determination of election contests is a judicial function only so far as authorized by statute. (*Tax-payers v. Kelly*, 49 La. Ann. 1039; *Reynolds Constr. Co. v. Police Jury*, 44 La. Ann. 863.)

A statutory mode of contesting elections is in every sense a special proceeding, and is subject to the well-settled rule that the tribunal exercising jurisdiction does not proceed according to the course of common law, but must resort to the statute alone to ascertain its power and mode of procedure. (*Dorsey v. Barry*, 24 Cal. 449; *Linegar v. Rittenhouse*, 94 Ill. 208; *Garrard v. Gallagher*, 11 Nev. 382.)

On Costs: The fees charged by the clerk are authorized by the statute. (Comp. Laws, 2469, 3586.)

It is respectfully submitted, on behalf of the clerk, that in the course of the hearing of each cause before the court it is made the duty of the clerk, under the provision of the statute above quoted, to note in his minutes each and every motion made by counsel in the case, whether the same be oral or in writing, as well as the ruling of the court thereon.

The history of the conduct of the case, as noted in the minutes of the clerk, is not an idle ceremony on the part of the clerk, but is required by the statute, and the minutes so noted, frequently become of the utmost importance where disputes arise, as is frequently the case, concerning motions, orders, rulings by the court, exceptions made by counsel in such matters; or where any dispute or uncertainty arises concerning such matters, the court invariably looks to the clerk's minutes for its information and guidance as to what occurred or was done, and the legislature has provided, and justly so, that litigants shall pay the clerk for the services which he has performed at their request.

Court Commissioner: There is not in the constitution of this state, nor in any statute of the state relating to the

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jurisdiction and powers of the supreme court, so far as we can ascertain, any provision by the court for the payment of any officer or clerk employed by, attached to, or connected in any manner with said court, except those enumerated in the statute, of which this commissioner is not one.

It is not claimed or contended for, we believe, that any appropriation for the payment of the expenses of the commissioner has been made or authorized by the legislature, and without such authority we are unable to see where there is any authority for the payment, in the face of the express prohibition of the constitution of Nevada (article 4, sec. 19): "No money shall be drawn from the treasury but in consequence of appropriations made by law."

The court having made the appointment at the suggestion and request of relators, the expense should be paid by them, and, if deemed a proper charge to be inserted in the costs bill at the conclusion of the contests, it should be taxed and made a part of such judgment as may be rendered in favor of the prevailing parties, if they have paid the same in the first instance.

Per Curiam:

Relator J. W. Legate and Joe Josephs, respondent, were opposing candidates for the office of clerk of the supreme court at the general election in 1910. On the face of the returns respondent had a majority of 11 votes. This contest was brought on the 3d day of January, 1911. At the same time a contest for the office of attorney-general of the state was instituted on the relation of George Springmeyer against Cleveland H. Baker, who on the face of the returns had a majority of 65 votes over the relator Springmeyer. Both relators were represented by the same counsel as were both respondents, and stipulated that their causes should be consolidated and treated jointly, in so far as the interposition of objections and the rulings of the court and other matters pertaining to the conduct of the trial might be concerned.

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[1] Respondents first appeared protesting against the information filed by relator and interposed a demurrer questioning the authority of the court in allowing the writ of *quo warranto*, asserting that "the court has no jurisdiction over the subject-matter of said proceeding, in that such proceeding can only be instituted in the name of the state on relation of and by the attorney-general of the state, and cannot be instituted in the name of the state on the relation of a private individual without the intervention of the attorney-general."

The court after due consideration of the contention of relator found it to be without merit (*McMillan v. Sadler*, 25 Nev. 165, 83 Am. St. Rep. 573), and on January 5, 1911, made an order allowing the proceeding in *quo warranto*.

[2, 3] On the 31st day of May, 1911, a commissioner was appointed to assist the court in opening, examining, and classifying the ballots. Counsel for respondents questioned the authority of the court to make the appointment of a commissioner, which was overruled by the court in the following opinion delivered from the bench:

"At the beginning of the contest in the above-entitled cause, after a demurrer and other motions and objections were overruled, and it appearing that in this contest an examination of some 25,000 ballots would probably be necessary, and it further appearing that in all probability approximately seventy-five per cent of said ballots would be free from objection of either of the parties to this contest, and the court being occupied with a heavy calendar of causes and other important official work, the court, in order to save several months of its time, believing it to be in the interest of the state that the time of the court should be consumed in other matters before them rather than in the examination of and passing upon ballots undisputed, under its authority made the following order appointing a commissioner: 'The court heretofore having signified their intention of appointing a commissioner to take charge of the counting of the ballots and report to the court any and all irregularities

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appertaining to the same, and to report to the court any and all objections during the trial of the above-entitled cases, it is ordered by the court that George L. Sanford be, and he is hereby, appointed commissioner in the above-entitled cases. As such commissioner, he is empowered to count all the ballots offered in evidence, to number in indelible pencil, and lay aside for each precinct, all ballots not clearly regular to which objection is interposed; to report to the court the number of ballots for each party to each proceeding to which there is no objection; to present to the court all the ballots to which objection is made; and to carefully preserve in the custody of the court, without change, otherwise than as marked for identification, all ballots which are offered in evidence.'

"The authority of the court to make this appointment is questioned by the respondents herein. We have no question whatever of our authority to make such appointment. It is contended by the relators that we have the inherent power to make such appointment; but, be that as it may, it is unnecessary for us to pass upon this question for the reason that we find express statutory authority to have made this appointment under sections 3279 and 3280 of the Compiled Laws of Nevada, which read:

"'A reference may be ordered upon the agreement of the parties, filed with the clerk, entered in the minutes: First, to try any or all of the issues in an action or proceeding whether of fact or law, and to report a judgment thereon. Second, to ascertain a fact necessary to enable the court to proceed and determine the case.

"'When the parties do not consent, the court may upon the application of either, or of its own motion, direct a reference in the following cases: First, when the trial of an issue of facts requires the examination of a long account on either side; in which case the referees may be directed to hear and decide the whole issue, or report upon any specific question of fact involved therein. Second, when the taking of an account is necessary for the information of the court before judgment, or for

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carrying a judgment or order into effect. Third, when a question of fact, other than upon the pleadings, arises upon motion or otherwise in any stage of the action; or, fourth, when it is necessary for the information of the court in a special proceeding.'

"Under the authority of the above provisions the court has the unquestioned authority, without consuming its time, to appoint a commissioner to take a count of the ballots which are undisputed and to have him report to the court for its information the actual ballots in dispute as well as the fact and number of undisputed ballots.

"As to how and by whom the commissioner appointed is to be paid, we are of the opinion that such compensation as may be due him for his services rendered is to be taxed as costs against the losing party to the contest.

"As to the authority of this court to order relators to pay in advance such costs, as is suggested by counsel for respondents, we find no such authority. As we have held, *supra*, that costs were not recoverable at common law, and a party is liable for them only when their payment is required by express statutory provision, it follows that, in the imposition of costs on either party, the court must find some authority, and as there is no authority to be found warranting the court, in a proceeding of this character, to impose costs in advance of a hearing of the cause, or to tax them against one party, or the other, until a judgment carrying costs is awarded, we are of the opinion that the costs are to be taxed against the losing party. The commissioner or referee appointed by the court is, however, privileged, and it is his lawful right to withhold his report until such payment, as he may be entitled to and awarded by the court, is paid by the party calling for his report, to be introduced as evidence or used in the trial of the cause before the court, and the court will not order the referee to deliver said report to the parties demanding it, or file the same, before his compensation is paid by the party desiring it, for the reason it would have no such authority.

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"The Court of Appeals of New York, in the case of *Geib v. Topping*, passed upon the point adversely to the contentions of respondents that relators could be compelled to pay the fees of the referee in advance, but also held that the referee was not bound to part with his report without the payment of his legal fees. (*Geib v. Topping*, 83 N. Y. 46.) The Supreme Court of Wisconsin, in the case of *King v. Whiton*, also held adversely to respondents' contention that the court had the authority to order relators to pay the fees of the referee in advance, but sustained the position that the referee was entitled to hold his report and demand his fees in advance before the same could be filed or used as evidence on the trial of the cause. (*King v. Whiton*, 15 Wis. 690.) For other cases in point, see *Cummins v. Robinson*, 2 Okl. 494, 37 Pac. 1064; *Fisher v. Raab*, 81 N. Y. 235. In support of the authority of this court to impose the costs upon the losing party, see *Schawacker v. McLaughlin*, 139 Mo. 333, 40 S. W. 935; *In re City of New Orleans*, 19 La. Ann. 382; *Lobdell v. Bushnell*, 27 La. Ann 395; 34 Cyc. 893, and cases therein cited.

"Such compensation as may be allowed for the services rendered by the commissioner will therefore be taxed finally against the losing party. Should, however, any fees or compensation, which the commissioner might be entitled to, be advanced by either party for the purpose of receiving and using the report of the commissioner in the trial of the cause, such party so advancing the same, if he prevail in the action, will be entitled to recover the same as other costs from the losing party."

During the proceedings there was presented for consideration of the court the legality of certain clerk's fees charged against relators which were passed upon in the following opinion delivered from the bench:

"There is presented for our determination the legality of the clerk's fees charged against relators for numerous motions, orders, and filings. A number of these which were made for the respondents have been charged to the relators. The fee of \$1.25 for a motion and \$1.25 for an

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order have been charged for the admission of testimony and for the overruling of objections to the introduction of evidence.

[4] "Costs were not recoverable at common law, and a party is liable for them only when their payment is required by express statutory provisions. (*McKenzie v. Coslett*, 28 Nev. 220; 11 Cyc. 24; *In re Green, Clerk*, 40 Mo. App. 491.) In *State, ex rel. Blount, v. Simmons*, 120 N. C. 19, 26 S. E. 649, the court said: 'The overcharges and abuses in making out bills of cost have become, and justly, a matter of public complaint. Yet there is this excuse, that, bills of costs having rarely been before the courts, clerks, no matter how conscientious, have had no authoritative construction to follow. Hence there has been very little uniformity; each clerk being, like the Gentiles of old, a law unto himself.'

[5] "As held in *Shed v. Railroad Co.*, 67 Mo. 687, statutes in reference to costs must be strictly construed, and an officer cannot legally claim fees unless the statute has expressly conferred the right to collect them. Section 474 of the practice act provides that 'there shall be allowed to the prevailing party in any action in the supreme and district courts, his costs and necessary disbursements, in the action or special proceeding in the nature of an action.' The following sections provide for the allowance of costs in judgments, and section 478 for their apportionment between the parties in the discretion of the court upon the rendition of judgment. The statute (Comp. Laws, 2469) allows the clerk of the supreme court, in addition to his other fees, \$1.25 'for entering any motion, rule, or order,' and 30 cents 'for filing each paper.' Rule 27 of this court provides that 'no transcript or original record shall be filed or cause registered, docketed or entered until an advance fee of twenty-five dollars is paid into the clerk's office, to pay accruing costs of suit.' In compliance with this rule, \$50 were paid to the clerk by relators. Section 491 of the civil practice act (Comp. Laws, 3586) was as follows: 'Every direction of a court or judge made or entered in

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writing, and not included in a judgment, is denominated an order. An application for an order is a motion.' The following sections provide that motions shall be made in the county in which the action is brought, or in an adjoining county in the same district, and the time within which written notice of motion, when written notice is necessary, must be given and the manner in which it must be served. In *State, ex rel. Blount, supra*, the court said: 'The charge—motion for judgment, 25 cents—is often made by clerks, but is illegal. The motion for which 25 cents is allowable is a motion in the cause made in writing and required to be recorded, not the mere verbal application for a judgment.'

[6] "We conclude that the fee of \$1.25 for entering every motion or order, which the clerk is authorized to charge under section 2469 of the Compiled Laws, is limited to orders and motions defined by section 491 of the practice act (Comp. Laws, 3586), and to directions of a court or judge required to be made or entered in writing, and to applications for the same. We do not understand that every offer of, or objection to, evidence is a motion, nor that every ruling of the court admitting or rejecting answers or questions, testimony, or evidence is an order within the definition of motion and order for which the clerk is authorized to charge under the fee bill. Nor do we think that the routine adjournment by the court of the trial or hearing, which may last several months, until the next day, or for a few days to accommodate pressing engagements of the court or counsel, is of the magnitude of a motion and order for continuance as generally understood, or warrants the charging of the fee for motion and order, except in cases where objection is made to the continuance and the court is required to rule upon the merits of the motion and objection; it being well understood when the proceeding commenced that such adjournments would be necessary because of the necessities of the court as well as counsel. But there is no statute or authority providing for the charging to relators or appellants, or requiring the payment by them before judgment, of fees incurred by respondents. Each party

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to an appeal or proceeding is primarily liable for the costs made by them respectively.

[7] "Since the adoption of Rule 27, *supra*, it has been the practice of the clerk to collect all costs of both parties out of the advance fee of \$25 deposited by the appellant or relator. While this course is not strictly in accordance with the law, it in most cases results in a convenience to both parties as well as to the clerk of the court. In most cases this advance fee is sufficient to cover the costs of both parties, and no injury to either party can ordinarily result therefrom, for the prevailing party is entitled to recover his costs. In a case, however, where costs are incurred on both sides upon an appeal or original proceeding, the clerk should collect his costs in advance from the respective parties incurring such costs. If respondents, by making objections, bringing witnesses, and in other ways, could create costs at will and without limit, which relators would be compelled to pay in advance in order to maintain the proceedings they have instituted, this exaction would result in a denial to poor relators of the right to contest and cause great and undue expense for wealthy ones.

[8] "As it is the duty of the clerk to issue subpoenas on request, the charge, 'Order to issue subpoenas on request, \$1.25,' will be disallowed unless the party against whom the charge is made applied for and obtained a written order that the subpoenas issue on request. As courts are open for the introduction of testimony and the reception of evidence, and as it is their duty to proceed with trials at the time they are set, the following charges are disallowed: 'Order overruling respondents' objection to appointment of commissioner, \$1.25. Motion and order to introduce testimony, \$2.50. Motion and order to examine ballot boxes, \$2.50. 24 orders overruling objections to examine ballot boxes, \$30. Motion and order to introduce in evidence, \$2.50. Order that counting the ballots be from 10 to 12, and 1:30 to 4, \$1.25. Motion and order for Mr. Hamilton to be sworn, \$2.50. Respondents' objections and ruling of court to proceed with cross-examination, \$1.25. Motion and order

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to open trunk containing packages, \$2.50. Order that commissioner mark packages of unknown precincts as exhibits, \$1.25. Motion and order to return all packages to trunk in charge of George L. Sanford, \$2.50. Motion and order to examine each precinct package, \$2.50.' Orders extending the time for filing demurrer, answer, and briefs are properly chargeable as motions and orders; and these, and items not heretofore mentioned as disallowed, will stand as charges against the party making the motion and obtaining the order, filing the paper or incurring the fee. Properly these orders would be in writing and filed or entered in the minutes of the court, and the prevailing parties would be entitled to recover judgment for their costs expended.

[9] "A request has been made that the ballots in each county to which objections are entered be attached together and filed as one exhibit and with a charge of one filing fee. As objections may be made to the admission of ballots in one precinct different from the objections made to ballots in another precinct in the same county, and as it is desirable to have the ballots of each precinct considered and kept separate so that they may be returned to the ballot box of that precinct without becoming intermingled with the ballots of other precincts, this request is not granted; but the relators may attach all ballots in the same precinct to which they object and have them filed as one exhibit, and the respondents may do the same."

Questions which arose regarding whether the ballots were public documents and whether they could be certified in by the clerks by express without being personally accompanied were passed upon and determined adversely to the contention of relators. (*State v. Baker*, 35 Nev. 1, *ante*.)

The further objection to ballots was first withdrawn by the contestants for the office of clerk of the supreme court, and on November 11, 1912, after the examination of about 18,000 ballots, the contest for the office of attorney-general was dismissed. The contest for the office of clerk of the supreme court was finally submitted,

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with briefs, November 29, 1912, and we need consider further only the ballots relating to that contest.

Doubtful ballots were laid aside and carefully considered a second time by all the members of the court. Nearly all the questions involved regarding the validity of the ballots have been determined in the cases of *Den- nis v. Caughlin*, 22 Nev. 452, 29 L. R. A. 731, 58 Am. St. Rep. 761; *Sweeney v. Hjul*, 23 Nev. 409; *State v. Sadler*, 25 Nev. 163, 83 Am. St. Rep. 573; *Lemaire v. Walsh*, 27 Nev. 258; *Strosnider v. Turner*, 29 Nev. 347, and *Strosnider v. Turner*, 30 Nev. 155, 133 Am. St. Rep. 710.

In accordance with these decisions and the pertinent sections of the statutes relating to elections, we have held as good ballots on which an apparent attempt to retrace a cross or an effort to make it more certain, and in doing so employing more lines than were necessary to properly make a cross, or on which there was a slightly blurred spot to correct a mistake, not indicating an intention to identify the ballot, or a slight erasure for the same purpose; or when the ballot paper was defective in manufacture; or when over a faint cross a second cross was placed, apparently for the purpose of making it more distinct; or when there was a slight blur connected with a cross, resulting from a defective stamp or too much ink on the pad; or when there was a slight pencil mark, or faint finger mark, or slight tobacco stain, clearly made by accident and not design, and ballots from which a strip had been torn along the edge by the election officers.

[10] As heretofore held, ballots were considered good on which more candidates were voted for than there were officers to be elected, but such ballots, when containing a cross after the names of both relator and respondent, could not be counted for either. Section 1858 of the Revised Laws provides that when a voter "marks more names than there are persons to be elected to an office, or if for any reason it is impossible to determine the voter's choice for any office, his vote for such office shall not be counted."

[11] Objection was made to a considerable number of ballots because in voting for a constitutional amendment

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the cross was placed after the word "Yes" or "No" and before the square. These ballots are held to be valid. For a time after the adoption of the Australian ballot system in this state, the statute provided that the candidate should be voted for by marking an X after his name, and it was held that the placing of the X after the name before the square did not invalidate the ballot. As amended in 1901 (Stats. 1901, c. 100), the statute (Rev. Laws, 1852) provides that the voter "shall prepare his ballot by stamping a cross or X in the square, and in no other place, after the name of the person for whom he intends to vote for each office." Since that time it has been necessary to place the X in the square after the name of the candidate in order to comply with the statute, and ballots with the cross after the name of the candidate, and before the square, which were formerly good, are now held to be invalid. (*Strosnider v. Turner*, 30 Nev. 155, 133 Am. St. Rep. 710.)

[12] The same section provides that "in case of a constitutional amendment, or other question submitted to the voters, the cross or X should be placed after the answer which he desires to give"; but the statute does not require that the cross in voting for or against a constitutional amendment be placed in a square, as is required in voting for a candidate. Consequently, under these two provisions of the statute, ballots with a cross before the square and after the name of a candidate are void, but when a cross before the square and after the word "Yes" or "No" in voting on a constitutional amendment are valid, as are also ballots in which a single cross voting on the constitutional amendment is placed in the square.

[13] Some of the ballots under objection had a cross placed in the square and another cross placed before the square and after the word "Yes" or "No" in voting on the constitutional amendment, thus:

Yes	X	X
No		

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These ballots were rejected because they have the extra cross, while all ballots with only one cross after the word "Yes" or "No" following the constitutional amendment, whether the cross be before or in the square, are counted.

[14] Section 1858 provides that "any ballot upon which appears names, words or marks, written or printed except as in this act provided, shall not be counted." Many of the ballots which have been rejected were invalidated because stamped with a cross in the square, following a blank space left for filling in the name of a candidate for public administrator when the name of no person appeared upon the ballot as a candidate for that office, evidently because no nomination for the place was made, thus:

For Public Administrator	Vote for One
	X

By the words "Vote for One," the voters using these ballots may have been misled into placing the stamp in the square following the vacant line, but the voter is required to know the law and that the statute is plain and inexorable in its language which invalidates the ballot if crosses or marks other than crosses in the square following the names of candidates, or crosses after the word "Yes" or "No" following a constitutional amendment, are placed on the ballot. On a few of such ballots the voter had written in with lead pencil the name of the person for whom he wished to vote for public administrator. The ballots are also rejected. This blank space could be used only for printing or inserting by the clerk on the ballot the name of some one nominated for the office after the ballot had been printed.

[15-17] Ballots having the following defects are also rejected: Crosses made with lead pencil or pen, or by marking with the wrong end of the stamp, as with a pen or brush; erasures not slight and destroying the texture of the paper; crosses on the back of the ballot, or on the front of the ballot excepting when in the squares opposite the names of the candidates, except when the vote

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is on a constitutional amendment; any other marks, not slight or apparently accidental, which might have been designed for the identification of the ballot, or which might be readily used for that purpose; two or more crosses deliberately made within the square, not for the purpose of retracing; and ballots with holes rubbed or torn through the paper by the voter.

[18] The question of the validity of some of the ballots has not been easy to determine, but the number of these is not sufficient to change the result in any event. One ballot from which the number had not been torn by the election officers is held to be valid as not being caused by the fault of the voter, under former decisions of this court.

Under these precedents and rules, out of 963 ballots objected to by respondent we have sustained the objection to 264, and out of 755 ballots objected to by relator we have sustained the objection to 234. As relator Legate has consequently lost 30 ballots more than the respondent Josephs, this number, added to the 11 majority which Josephs had upon the face of the election returns, makes his majority 41.

The certificate of election as originally issued to Joe Josephs, respondent, will stand, and it is ordered and adjudged that he was elected to the office of clerk of the supreme court at the general election held in 1910, for the term of four years, and that he is entitled to the office accordingly.

[Nos. 1888 AND 1917]

B. A. GAMBLE AND F. S. CHADBOURNE, PLAINTIFFS-RESPONDENT, v. L. J. HANCHETT, DEFENDANT; LAURA C. WRIGHT, ERNEST WRIGHT, AND ANNIE BEATRICE WRIGHT, DEFENDANTS-RESPONDENT.

DEWITT CLINTON BLAIR, IN HIS OWN RIGHT AND AS ADMINISTRATOR, WITH THE WILL ANNEXED, OF THE ESTATE OF JOHN I. BLAIR, DECEASED, SILVER PEAK MINES AND THE SILVER PEAK GOLD MINING COMPANY, DEFENDANTS-APPELLANT.

ON PETITION FOR REHEARING

1. APPEAL AND ERROR—PETITION FOR REHEARING.

The questions raised for the first time on a petition for a rehearing will not be considered.

2. IDEM—IDEM—JURISDICTION—JUDGMENT—ESTOPPEL.

It is a general rule that a jurisdictional question may be raised at any time. However, a party, by his conduct, may become estopped to raise such a question. Where a party has treated a judgment as final throughout the proceedings, applied for and obtained relief upon the assumption that such judgment was final, and upon appeal prayed for its affirmance or reversal, he will not thereafter be heard to question its finality.

3. IDEM—IDEM—REPLY TO PETITION.

An appellant who has prevailed on appeal and obtained a reversal of the judgment and order appealed from, as prayed for, will not be heard for the first time on reply to a petition for a rehearing, to suggest that a further order be made directing the lower court to dismiss the action.

4. JURISDICTION—COURTS—IMPLIED ADJUDICATION.

It is a primal duty of all courts to keep strictly within their jurisdiction. In every affirmative action taken by a court, there is an implied adjudication of jurisdiction.

5. IDEM—IDEM.

A court should always take note of a suggestion of want of jurisdiction, notwithstanding the rule as to waiver or estoppel, where rights of third parties may be involved and may raise the question of its own motion.

6. WRIT OF ASSISTANCE—WHEN MAY ISSUE.

A writ of assistance only issues as part of the process to carry out a final judgment.

7. JUDGMENTS.

Whether a judgment is final or is only interlocutory is a question of law.

Argument for Petitioners

8. MERITS OF CASE—FORMER OPINION REAFFIRMED.

The decision on the merits heretofore rendered (34 Nev. 351) reaffirmed.

TALBOT, J., dissenting from order denying petition for rehearing, and concurring in order reversing judgment.

PETITION for rehearing. [For former opinion, see 34 Nev. 351.] **Denied.**

The facts sufficiently appear in the opinion.

J. W. Dorsey (*R. M. F. Soto*, of Counsel), for Petitioners:

The judgment appealed from was not final, but merely interlocutory. Consequently it is nonappealable and for the same reason the trial court was without jurisdiction to hear or entertain a motion for a new trial, except to dismiss it, or, which is the same thing, to deny it as premature. Hence the appeal from the judgment, being merely interlocutory, should be dismissed, and the order denying a new trial should be affirmed, or the appeal therefrom also dismissed, because the motion was premature.

These objections affect the subject-matter in respect to jurisdiction, and are therefore open to inquiry or suggestion at any time, even on the court's own motion. (*Bullock v. Taylor*, 112 Cal. 147, 151; *Pac. Mut. Ins. Co. v. Fisher*, 106 Cal. 224, 229; *In re Castle Dome M. & S. Co.*, 79 Cal. 246; *State v. Logan*, 1 Nev. 509, 514.)

It is a well-settled principle that consent cannot confer jurisdiction over the subject-matter. (1 Black, Judgm. 2d ed. sec. 217.)

In a word the record must disclose whether jurisdiction exists, and a stipulation as to the correctness of the record cannot divest this court of the power to judge for itself, as a pure question of law, whether the judgment is a final judgment from which an appeal is allowed by law. (*Estate of Pichoir*, 139 Cal. 694; *San Francisco L. Co. v. Bibb*, 139 Cal. 325, 328; *Estate of Scott*, 124 Cal. 671; *McKeon v. Naughton*, 88 Cal. 462, 566; *Gibson v. Harmon*, 54 L. R. A. 268; *State v. Aloe*, 47 L. R. A. 394, 397; *Attorney-General v. Rice*, 64 Mich. 385, 391; *Duff v. Duff*, 71 Cal. 513; *Williams v. Conroy*, 52 Cal. 414; *Koford v.*

Argument for Petitioners

Gordon, 122 Cal. 314; *State v. Langan*, 29 Nev. 459; *Kapp v. Kapp*, 31 Nev. 70; *Kapp v. District Court*, 32 Nev. 264.)

The trial court was without power to hear or determine the motion for a new trial except to dismiss or deny it. (*Descalso v. Duane*, 33 Pac. 928; *Perkins v. N. S. M. Co.*, 10 Nev. 405; *Rhodes v. Williams*, 12 Nev. 20; *Williams v. Conroy*, 52 Cal. 414; *Crowther v. Rowlandson*, 27 Cal. 376; *Harris v. S. F. S. R. Co.*, 41 Cal. 393; *Hastings v. Hastings*, 31 Cal. 95; *Comp. Laws*, 3290; *Painter v. Painter*, 113 Cal. 371; *Hinds v. Gage*, 56 Cal. 486; *Reclamation District v. Thisby*, 131 Cal. 572; *Bates v. Gage*, 49 Cal. 126.)

The law makes no distinction between an appeal in an action at law and one in an equity suit. (*Comp. Laws*, 3857; *Whitmore v. Shiverick*, 3 Nev. 288; *Burbank v. Rivers*, 20 Nev. 81.)

The court should determine of its motion the question of its jurisdiction of an appeal, though the point be not raised by the parties. (*Sennette v. Police Jury*, 56 South. 653; *Ferguson v. Mott*, 139 S. W. 218; *Cable v. Duke*, 208 Mo. 557, 106 S. W. 643.)

The evidence does not warrant the conclusion that the plaintiffs were guilty of laches. It is not shown that the delay has worked any injury to the appellants. Laches consists not in mere delay, but in delay which works an injury. (*Comans v. Tapley*, 57 South. 567; *Boone v. Templeton*, 158 Cal. 290.)

No evidence was introduced to show the value of the mining properties at any time. The respondents were not called upon to offer performance in the face of the hostile claim of Hanchett in which he was abetted by the attitude of Silver Peak Mines and John I. Blair in the litigation instituted by Blair.

In Answer to Appellant's Reply: The judgment of this court on appeal was one of a mere reversal, without qualification, of the judgment and order appealed from.

The effect of such reversal without restrictions was to remand the cause to the court below, there to be proceeded with as if it had never been tried. (3 Cyc. 460; *Myers v. McDonald*, 68 Cal. 162; *Stearns v. Aguirre*, 7 Cal. 443; 2

Argument for Appellants

Black on Judgments, 2d ed. sec. 683; *Carpy v. Dowdell*, 131 Cal. 499.)

Counsel rely upon *Feusier v. Sneath*, but this court cannot say as a matter of law that upon a new trial the respondents and the defendants Wright may not be able to adduce evidence to entitle them again to the same judgment as is now before this court. (*Schroeder v. L. T. V. G.*, 60 Cal. 467; *Merrill v. First Nat. Bank*, 94 Cal. 59.)

It was the appellants who claimed that the judgment is final. In the same opinion, denying the writ of prohibition this court stated that the petitioners (appellants here) contended among other things: "(4) That the judgment appealed from is a final one, from which an appeal will lie."

The principal contention of the appellants in their application for a writ of prohibition was that the judgment should not be enforced by a writ of assistance, the execution of which had been stayed by the giving of a \$150,000 bond.

Samuel Platt and Geo. A. Bartlett (Rush Taggart and Clarence Blair Mitchell, of Counsel), for Appellants:

The petition for a rehearing should be denied. The judgment appealed from is a final judgment. Respondents, having treated it as a final judgment, cannot be heard, especially for the first time on petition for a rehearing, to question its finality. (*Perkins v. S. N. S. M. Co.*, 10 Nev. 405; *Costello v. Scott*, 30 Nev. 43; *Bryant v. Davis*, 22 Mont. 534; *State v. Comm.*, 22 Nev. 71; *Crosby v. N. B. M. Co.*, 23 Nev. 74; *Brandon v. West*, 29 Nev. 140; *Powell v. N. C. O. Ry. Co.*, 28 Nev. 305; *Beck v. Thompson*, 22 Nev. 419; *Kirman v. Johnson*, 30 Nev. 154.)

The case upon the merits is thoroughly covered by the opinion filed. The petition for a rehearing presents nothing new nor anything not thoroughly covered by the briefs heretofore filed and considered by the court.

The facts and law of this case, as shown by the record and opinion filed, justifies judgment being entered in

Opinion of the Court—NORCROSS, J.

favor of appellants. Appellants ask that the judgment of this court heretofore entered be modified by directing that judgment be entered in favor of the defendants-appellants, dismissing the action with costs. (Rev. Laws, 4835, 4839; *Feusier v. Sneath*, 3 Nev. 120.)

By the Court, NORCROSS, J.:

Upon petition for a rehearing, counsel for respondents raise, for the first time, the question of the jurisdiction of this court to consider and determine the appeal. Want of jurisdiction is urged upon the ground that the judgment entered in the court below was not a final judgment, and therefore an appeal therefrom would not lie.

This court has repeatedly held that questions raised for the first time on petition for rehearing will not be considered. (*Kirman v. Johnson*, 30 Nev. 154; *Brandon v. West*, 29 Nev. 135; *Powell v. N. C. O. Ry.*, 28 Nev. 305, 343; *Beck v. Thompson*, 22 Nev. 419.)

While it is a general rule that a jurisdictional question may be raised at any time, it is also settled in this court that a party may, by his conduct, become estopped to raise such a question. A party in an appellate court who has treated the judgment as final and asked that the same be affirmed or reversed will not be heard afterwards, when the decision has gone against him, to contend that the judgment was not final and the court therefore without jurisdiction to determine the questions presented on the appeal.

In *Costello v. Scott*, 30 Nev. 88, a case where the finality of the judgment was questioned for the first time on petition for a rehearing, we said: "Even if there was room for argument as to whether the judgment rendered in this cause was a final judgment, appellants, by treating it as such and appealing therefrom, are estopped to deny the finality of the decree"—citing *State v. Commissioners*, 22 Nev. 78.

In *State v. Commissioners*, *supra*, this court said: "Lander County treated it as a final judgment when it appealed from it to this court, and we entertained the

appeal and decided the case upon its merits. Having treated the entry as a judgment decisive of the merits of the case, and having taken and received the benefit of a remedy which it was otherwise not entitled to, we think that Lander County, and consequently the defendants, as its representatives, should now be estopped to claim that no final judgment has been entered in the action. In *Bigelow on Estoppel*, p. 601, the author says: 'It may accordingly be laid down as a broad proposition that one who has taken a particular position in the course of a litigation must, while that position remains unretracted, act consistently with it.' * * * In *Clark v. Dunman*, 46 Cal. 204, the court said: 'The only point to be decided under the agreed statement is whether the decree of August 20, 1869, is a final money judgment in the sense of the statute, and therefore bore interest. The plaintiff in this action treated the decree as final when he prosecuted an appeal from it. If it was not final his appeal should have been dismissed on that ground. But we entertained the appeal and decided the cause, and in justice the plaintiff should now be estopped to deny the finality of the decree.' "

In *Brandon v. West*, *supra*, we said: "There was no motion made to dismiss the appeal from the judgment because of any alleged defect therein, nor was the sufficiency or regularity of the appeal questioned upon the presentation of the cause. The case was briefed, argued, and presented as though the appeal was entirely regular. Its sufficiency, therefore, cannot now be questioned upon petition for rehearing."

In *Taylor v. Crook*, 136 Ala. 354, 34 South. 905, 96 Am. St. Rep. 26, it was held that one who induces the dismissal of an appeal on the ground that the decree is not final cannot afterward claim as against a bill of review that it was final. See, also, *Ohio and Mississippi Railroad Co. v. Heaton*, 137 Ind. 14, 35 N. E. 687.

In *Silver Peak Mines v. District Court*, 33 Nev. 120, we said: "By the stipulation in the lower court regarding a bond to be given in compliance with that section,

petitioners become estopped to deny that the section governed the undertaking to stay execution in the case, or to assert, as they have done, that the other sections controlled the stay bond. This is not the first time that we have had occasion to hold that the parties are estopped to rely in this court upon a position the reverse of that taken by them in the district court."

We see no valid reason why the rule of estoppel to question the finality of the judgment ought not to apply as well to a respondent who has assumed throughout the proceedings that the judgment was final. In this case counsel for respondents, not only did not question the finality of the judgment in brief or oral argument, but prayed for its affirmance. In the lower court they stipulated that the statement on motion for a new trial should be regarded as the statement on appeal from the judgment. They also petitioned for and obtained an order for the issuance of a writ of assistance as a part of the process to carry out the judgment, assuming, as they must have done for such purpose, that the judgment was final. (4 Cyc. 294; 3 Standard Procedure, 140; *Stanley v. Sullivan*, 71 Wis. 586, 37 N. W. 801, 5 Am. St. Rep. 245.) See "Argument for Respondents," *Silver Peak Mines v. District Court*, 33 Nev. 108.

In the briefs filed by counsel for respondents in the prohibition proceedings last above cited, which briefs were referred to and made a part of the briefs filed in this case, it was one of the contentions of counsel for respondents, as a reason why prohibition would not lie against the issuance of the writ of assistance, that the petitioners in that case had the right of appeal from the order granting the writ, under the provisions of Comp. Laws, 3425. Under that section, the order, if appealable, was so because it was "a special order made after the final judgment." In this court and the court below both parties have contended that the judgment was final, and both parties have sought for and obtained relief upon the theory that the judgment was final, and both courts have assumed its finality.

Opinion of the Court—Norcross, J.

It is a primal duty of all courts to keep within their jurisdiction. Whenever a court takes any affirmative action there is an implied adjudication that it has jurisdiction so to act. (11 Cyc. 700; *Manier v. Trambo*, Fed. Cas. No. 18,309; *Cook v. Weigley*, 68 N. J. Eq. 480, 59 Atl. 1029.)

Whether the judgment is final or only interlocutory is a question of law. That question having impliedly been determined in favor of its finality, and both parties having proceeded in both courts upon the assumption that it was final, neither party will be heard to raise the question for the first time on petition for rehearing.

Undoubtedly, a court, at any time, even of its own motion, may determine a question of jurisdiction, and there are cases where, notwithstanding that the rule as to waiver would ordinarily apply, the court should not refuse to take notice of a suggestion of want of jurisdiction; for example, a case like that of *In re Castle Dome Mining Co.*, 79 Cal. 246, 21 Pac. 746, where a party interested in maintaining the judgment and who would be injuriously affected by its reversal is not made a party to the appeal by the service of notice of appeal upon him.

A court, however, should not be required, on petition for a rehearing, to go into the consideration of a legal question, which has virtually been adjudicated in accordance with the contentions of all the parties, for the sole purpose of affecting the jurisdiction in the event the direct ruling might be contrary to that implied.

The lower court determined all the issues raised by the pleadings in the case, and the judgment entered was manifestly intended as a final judgment, and it was so treated by all the parties.

In addition to the jurisdictional question, the petition for a rehearing is confined to an argument of the questions fully considered and determined in the opinion heretofore rendered. We entertain no doubt as to the correctness of the conclusion heretofore reached upon the merits of the case.

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Included in the reply to the petition for a rehearing, counsel for appellants have requested this court to modify the order heretofore made by directing the court below to enter a judgment in favor of the defendants dismissing the action with costs. No contention was made, upon the hearing, that such an order should be made by this court. If counsel for appellants were of the opinion that this is such a case as would justify this court in directing a judgment in appellant's favor, they should have presented that question upon the original hearing when opposing counsel would have had full opportunity to be heard in opposition. A question as to the modification of the order heretofore entered, in the respect suggested, will not now be considered. (*Brandon v. West*, 29 Nev. 138.)

The petition for a rehearing is denied and the cause remanded.

SWEENEY, C. J.: I concur.

TALBOT, J., dissenting from the order denying petition for rehearing, and concurring in the order reversing the judgment:

The opinion of the majority of the court, stating the facts at length, the contentions of the parties, and the history of the case, with a copy of the contract in dispute, will be found in 34 Nev. 351. Since the rendition of the opinion the petition for rehearing and answer thereto have been filed, and the petition has been denied by the two members of this court who concurred in the opinion.

Consideration of the controlling facts is essential to a proper understanding of the case.

In the spring of 1893 the defendant Gamble went to New York and obtained from John I. Blair an option on all the stock of the Silver Peak Mines, with the privilege of investigating the property, making surveys, prospecting, taking ore from the mines, and working it at the mill; the proceeds to be paid to the Silver Peak Mines

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unless he purchased the property, in which case the same would become a part of the purchase price of \$500,000, \$200,000 of which was required to be paid on or before the 1st day of November, 1893. Under date of August 5, 1893, he assigned a half interest in this contract to Chadbourne. A short time thereafter Gamble took out experts and had them examine and report upon the mines. In consideration of the receipt of \$250 from Chadbourne and J. B. Wright, and transportation, Gamble agreed, on October 30, 1893, to go to New York to try to obtain a bond on the property of the Silver Peak Mines and to transfer to Chadbourne and Wright a one-third interest each in any bond he might acquire.

Under date of November 13, 1893, Gamble obtained from John I. Blair an agreement for an option on the property of the Silver Peak mines. The time for fulfilling certain conditions connected therewith was extended by John I. Blair to February 1, 1894. In January, 1894, C. J. Canda, who represented John I. Blair and the Silver Peak Mines and transacted the business for them and was secretary of the company, had received a letter from Chadbourne stating that they had concluded to send L. J. Hanchett to New York. As a result of the latter's visit to that city and of his negotiations with Canda, John I. Blair by letter dated February 2, 1894, extended the time for the execution of the contract or option until the 1st day of May, 1894. On April 24, J. B. Wright wrote to Canda asking an extension of ninety days from May 1, 1894. On May 4, 1894, Canda wrote to Wright saying that they would give him all reasonable extensions necessary, but objected to recommending Mr. Blair to give as much as ninety days' additional time. In the letter Canda stated that he was informed Mr. Chadbourne was one of Mr. Wright's most influential associates.

On June 4, 1894, Wright wrote to Canda, expressing gratification for the extension by telegram to July 1. On June 19, 1894, Canda wrote to Wright that as the result of a full conference with Hanchett he was sending a proposed contract executed by the Silver Peak Mines, to

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execute both copies if satisfactory, and to send one back to Canda, or both if they did not meet with his approval. Canda also stated in this letter that the contract was slightly changed from the copy which Hanchett had taken with him.

On July 27, 1894, Canda wrote to Wright, inclosing contract as they in New York had modified it, asking Wright to return to Canda the two executed copies of the contract sent to Wright on June 19, and saying that they would defend the title to the mines until Wright was satisfied to pay for them. The contract enclosed with Canda's letter of July 27, 1894, was in the same form as the one given by the Silver Peak Mines in the name of Hanchett, of date September 7, 1894, which is in controversy, excepting that the date for the party of the second part to be put in possession and commence development work was August 1, 1894, in the contract sent to Wright, and October 1, 1894, in the one sent to Hanchett, and the dates allowing election to purchase August 1, 1895, and December 31, 1895, respectively, and the periods for the payment were accordingly.

On July 27, 1894, Canda transmitted a letter of John I. Blair to Wright, agreeing that if he exercised the option Blair would deliver on the completion of the purchase all the shares of the capital stock of the Silver Peak Mines. It will be observed that the time for exercising the option under this letter and under the agreement to Wright, which belonged to him and his associates, had a long time to run after the date of the contract in the name of Hanchett.

The evidence is clear and undisputed that Gamble secured the option originally and conveyed an interest to Chadbourne; that later Gamble, Chadbourne, and Wright had Gamble go to New York to obtain an option or extension in which they would each hold a one-third interest; that later Chadbourne and Wright sent Hanchett to New York as their representative to obtain a further extension or option, which was given to May 1. While these fiduciary relations existed with Gamble,

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Chadbourne, and Wright, and within the period of ninety days which Wright had asked of Canda as an extension of their option from that date, Wright, with the assistance of Hanchett, obtained the agreement of July 27 in his own name, but had that agreement returned to Canda, and nearly eleven months before the time for its fulfillment had expired Wright, Hanchett and Canda had another contract, in similar form but with different dates for payment and performance, executed by the Silver Peak Mines in Hanchett's name, under date of September 7, 1894, which is the one in controversy.

Upon the delivery of this contract a direct agreement was executed between Wright and Hanchett, which provided that Wright should have, clear of expense, a twenty per cent interest in the contract in the name of Hanchett. On September 5, 1894, Wright stated in a telegram to Canda: "On account of the pressure of company business caused by the late strike I find I will not be able to personally attend to Silver Peak business and will place it entirely in the hands of Mr. L. J. Hanchett to personally supervise and manage. On that account would like much to have the bond made in his name instead of mine." On September 8, 1894, Hanchett wrote to Canda: "There are too many people in the bond, on our side, who want to share but who will not put up any money. For that reason Mr. Wright telegraphed you to change the bond to my name, as that will reduce the number interested so that agreements can be reached and work commenced. I am to look after the interests of Mr. Wright and the ones directly interested, that is, ones who have put up the money or have an active part in raising it. All of the above so that you will understand why I am delaying and why I want the bond transferred to me."

The contract in controversy, dated September 7, 1894, in Hanchett's name, was forwarded with Canda's letter to Wright dated September 19, 1894. On the same day Canda wrote requesting the return of the other agreement, which had been signed by the company, making it

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clear that Wright, notwithstanding he was a party to the venture and a part owner in the option, which had originally been secured by Gamble and later as an extension in the name of Wright for the parties to the venture, was mainly instrumental in securing the new contract in the name of Hanchett, and was assisted in so securing the same by Hanchett, Canda, and the Silver Peak Mines without the consent of Gamble or Chadbourne. These facts, as shown by letters, telegrams, contracts, and depositions, beyond dispute indicate that Wright, Hanchett, Canda, and the Silver Peak Mines, while well knowing that Gamble and Chadbourne had an interest in the option, given for the Silver Peak Mines, surrendered the contract in the name of Wright while they knew it was owned by him in common with Gamble and Chadbourne, and had a new agreement executed in the name of Hanchett for the purpose of depriving Gamble and Chadbourne of their two-third interest in the agreement or option and eliminating them from the venture. This was done with the intention and side agreement on the part of Wright and Hanchett that Wright should have twenty per cent clear of expense and Hanchett the remainder of any money which might be made out of the option, and with the willingness of Canda and the Silver Peak Mines to transfer the rights of Gamble and Chadbourne to Wright and Hanchett, at their suggestion, when they had millionaire kindred and associates who, it was hoped, might be induced to pay the Silver Peak Mines a half million for the property.

It is shown not only by the deposition of Gamble that Canda, who acted as agent for the company in all the negotiations, was informed regarding the associated interests of Gamble, Chadbourne, and Wright, but notice of this was also given to Canda. In the letter of December 12, 1894, to Canda, Gamble stated: "Of course, I can hold Mr. Wright and Hanchett by law to give me the interest agreed upon. * * * The entire facts are as follows: Mr. Wright and Chadbourne made an agreement

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with me to carry my one-third interest of the amount we would hold and they were to furnish the money for all expenses. * * * Mr. Wright claimed that Mr. Hanchett had some business of his own in New York and would attend to this for me. I was not to pay any of the expenses under my contract, but for fear something might happen I paid one-third of the expense. When Hanchett returned he claimed an interest in the contract. * * * Then Mr. Wright assigned the contract to Mr. Hanchett. Why I do not know. I then asked Mr. Wright to give me a contract for my one-third and he told me to go to Hanchett." In January, 1895, Gamble wrote to Canda: "These men were my partners, and I don't see how they can make a contract on the side without telling me and then declare me out. My lawyers say that I can hold Wright and Hanchett to the original agreement, but I don't want a lawsuit if it can be avoided, and this can be avoided by telling them to do as they agreed to do by and with me. If you will do that Mr. Hanchett will lose no time in signing over my interest."

On November 21, 1895, the Silver Peak Mines extended to August 12, 1896, the option which had been given in the name of Hanchett on September 7, 1894. This extension inured to the benefit of Gamble and Chadbourne because they were part owners in the contract for the reason stated before. Canda, the representative of the Silver Peak Mines, had declined to recognize any further rights in Gamble; and as Gamble could not obtain recognition of his rights in this agreement, which in effect withheld from him any opportunity of going into possession of the mines or purchasing them if he obtained the required money or found parties willing to take them over, he filed his complaint in this action on March 2, 1896, and on March 6, 1896, a *lis pendens*, asking to be decreed the owner of a one-third interest in the contract, over five months before the termination of the extension obtained by Hanchett.

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The Silver Peak Mines brought suit against Hanchett in the United States Circuit Court for the Southern District of New York on April 6, 1897, and in the United States Circuit Court in Nevada on April 17, 1897, asking for a finding that the Hanchett contract was terminated, for the payment of royalties, and for damages for improper mining, which actions resulted in judgment being rendered against Hanchett.

John I. Blair brought a suit against the Silver Peak Mines and Hanchett in the federal court of Nevada in July, 1897, to foreclose the mortgage given by the Silver Peak Mines to him in 1879 for \$204,000, bearing six per cent interest, obtained judgment, and had the property sold. In 1898, Blair recovered judgment in the United States Circuit Court for the Southern District of New York against the Silver Peak Mines for \$68,000 for money which he had advanced to enable it to maintain and develop its properties. He brought suit upon that judgment and obtained judgment in the United States Circuit Court for the District of Nevada, and had the property sold. Gamble, Chadbourne, and Wright were not made parties in any of the suits brought by the Silver Peak Mines or by Blair, and it will be observed that all of these actions were brought after the filing of the complaint and the *lis pendens* in the present case brought by Gamble.

If notice to a corporation is required to be given to one agent or officer more than another, it would ordinarily be given to the secretary. Canda, as the agent and secretary of the Silver Peak Mines, and as the business representative of John I. Blair, conducted the negotiations and secured the execution of the contracts. Blair, living in New Jersey, at the advanced age of about ninety years, was not to be seen by the parties securing the options, and the negotiations, when conducted personally or by letter, were with Canda in New York. Notice to Canda as the representative of Blair and the company, and as secretary of the company, was notice to Blair and

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to the company; consequently they all had notice that Gamble and Chadbourne and Wright were interested in the option and extensions. Canda, and through him the Silver Peak Mines and John I. Blair, certainly had notice of their own acts and that they had given the original option to Gamble with the understanding that he would induce men of capital to join in the enterprise; that he made trips to the property and at considerable expense had taken experts to examine and report upon it; that he had conveyed interests in the option to Chadbourne and Wright; that Chadbourne and Wright had assisted in securing an extension; that Chadbourne and Wright had sent Hanchett to interview Canda in New York and secure an extension or a new agreement giving an extension or further time, the agreement for which was given in the name of Wright; and that before the contract given to Wright for the benefit of Gamble, Chadbourne, and Wright had expired, Wright, by conspiring with Hanchett and Canda, obtained from the Silver Peak Mines a new option or extension in the name of Hanchett and surrendered the one given to Wright for the benefit of himself, Gamble and Chadbourne.

In addition to knowing all the facts which indicated the ownership of Gamble, Chadbourne, and Wright in the option, notice was given to Canda and the Silver Peak Mines of such ownership, although not necessary. Soon after the contract was executed in the name of Hanchett, and perhaps as soon as Gamble became aware of it, he wrote to Canda asserting his rights, stating that they were trying to deprive him of his interest and control by having the agreement taken without his name, and pleading to be protected. Consequently it appears that before the commencement of this suit by Gamble, and long before the institution of the suit by the Silver Peak Mines against Hanchett, Canda and the Silver Peak Mines were informed regarding the claims of Gamble, and before the contracts in the name of Hanchett were given, and regarding the facts which in law gave Gamble, Chadbourne and Wright an interest in the contracts, including

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the last extension or agreement executed in the name of Hanchett.

The original promotion and expenditures were paid by Gamble, by reason of whose efforts Chadbourne, Wright, and Hanchett became interested. There was no pretense by Gamble that he had the money for developing the mines and building reduction plants or purchasing the property, but he made it plain from the beginning that he was seeking an option for the purpose of inducing men with capital to join him. Blair had long held the stock or mines, which had become hundreds of thousands of dollars in debt, and was anxious to sell or deal with some one who would make disposition of them.

Gamble was good enough to use as a promoter to interest men who might be induced to develop and purchase the property at a big price. It is shown by their respective correspondence that Gamble was given the option with the express understanding between him and Canda and Blair and the Silver Peak Mines that he would try to interest men with means. It was not expected that he would pay his own money for the mines. They were all aware that he was without means to buy the property. Under the well-settled rules of equity and just legal principles, after Chadbourne, Wright, and Hanchett had been induced to join and take an interest with Gamble in the option, Hanchett and Wright and the Silver Peak Mines could not by a surrender of the option without the consent of Gamble and Chadbourne shift it to the name of Hanchett so as to deprive them of their interest or defraud them of their right to share in the venture. Under these circumstances, Gamble ought not to be deprived of his interest because not possessed personally of means to buy the property, nor should any different rule of law be applied against him because he is poor, nor is the long and persistent opposition of his wealthy opponent any good reason for depriving him of his rights. He is as much entitled to comply with the terms of the agreement if he obtains any money required from others as if he

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possessed any amount needed for fulfilling the agreement and taking over the property.

Canda wrote in his letter to Hanchett of September 19, 1894: "I send this to Mr. Wright with a letter to Mr. Wasson, asking him to return to me, before he delivers these to you, the original papers which have been signed by the company, and which he holds. It does not seem right that contracts executed by the company should be in two hands at the same time." And notwithstanding the contract in the name of Wright had not expired at the time Canda forwarded the one in the name of Hanchett, in the letter of January 8, 1895, Canda wrote to Gamble: "Mr. Wright also permitted his contract to expire, and after some weeks we entered into an agreement with Mr. Hanchett. The contract stands with him." Mr. Canda, who represented the corporation, and whose knowledge was notice to the Silver Peak Mines, had the Silver Peak Mines give an option to Gamble with the expectation that he would induce men with capital to develop or buy the mines; and after Gamble had induced Chadbourne and Wright to take an interest with him in the option, and after Wright and Chadbourne had authorized Hanchett to try to obtain in New York an extension or further option on the property, one-third of the expense of Hanchett's trip there being paid by Gamble, the Silver Peak Mines, acting through Canda, and while fully cognizant that Gamble had secured the option originally and that Chadbourne had acquired an interest in it, gave to Wright in his name the extension for which Gamble, Chadbourne, and Wright as parties to the venture and Hanchett had been working; and before this contract in Wright's name had expired it was surrendered by him, and at the instigation of Wright and Hanchett a new contract or extension was given by the Silver Peak Mines in the name of Hanchett.

By Wright first taking a contract in his own name while he was a party to the venture with Gamble and Chadbourne, and surrendering that contract and having another one taken in the name of Hanchett, and the side

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agreement made between Wright and his father-in-law Hanchett, providing that Hanchett should hold four-fifths of the agreement for his own use and one-fifth as trustee for Wright, and that Hanchett at his own expense was to perform the acts required of Wright, it is evident that Wright and Hanchett, Canda, and the Silver Peak Mines were quite willing to eliminate Gamble and Chadbourne and their interest from the contract or option to meet the desires of Wright and Hanchett to secure for themselves the money to be made out of the option, without having to give Gamble and Chadbourne their proportions. Such practices should not in a court of equity deprive Gamble or Chadbourne of their rights in the venture. The moral sense of some men is so blunted that they believe they may deprive others of their rights by acquiring a contract, deed, or evidence of title or ownership in a different name, and it is the duty of a court of equity by its decision to correct such erroneous conclusions and give relief against the perpetrators of such fraudulent acts.

Canda and the Silver Peak Mines, in their eagerness to dispose of the property upon which such a large amount had been expended, complied without hesitation with the requests of the men associated with wealthy interests. Gamble having taken the original option, and having induced the men who might obtain the necessary means to join in the venture, had served a purpose, and, being considered no longer necessary to carry out the project, there was an attempt to cast him and Chadbourne aside in order that Wright and Hanchett might secure the benefits to which Gamble and Chadbourne, the pioneers in the project, might be entitled, notwithstanding the agreement of Wright and Chadbourne to carry Gamble's one-third interest and to furnish the money for expenses.

Whether these methods of high finance on the part of business men in New York and California be considered as "without the slightest warrant for a charge of fraud or double-dealing," and whether Wright and Canda and Hanchett and the Silver Peak Mines believed that by such

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practices they could eliminate Gamble and Chadbourne and any interest which they held or profits to which they might be entitled in the venture, equity and just legal principles will not sanction such methods.

As Hanchett was aware that Gamble was the original party and had taken Chadbourne and Wright in as parties to the venture, Wright and Hanchett could not justly deprive Gamble and Chadbourne without their consent of their interest by taking extensions or new contracts in the name of Wright or in the name of Hanchett. Although Canda and the Silver Peak mines had full knowledge of these fiduciary relations, which under the law would prevent the rights of Gamble and Chadbourne from being cut off by shifting the contracts or taking them in the name of Wright or Hanchett, the rights of Gamble and Chadbourne would remain and be protected the same if Canda and the Silver Peak Mines had not been aware until given notice by or before suit that Gamble and Chadbourne held any interest in the venture.

As was said by the Supreme Court of the United States in *Root v. Railway Co.*, 105 U. S. 215, 26 L. Ed. 975: "Where a defendant has wrongfully intermeddled with property already impressed with a trust, he may be required as a trustee to account for it, as was done in the case of *People v. Houghtaling*, 7 Cal. 348, because trust property may be followed, wherever it can be traced, into whose-soever possession it comes, except that of a bona fide purchaser without notice."

There is no pretense that after Gamble had acquired the original option, taken experts to examine and report upon the mines, made trips to New York to secure contracts and extensions, and endeavored to find men to finance the promotion, and had arranged for Chadbourne to take a one-half interest with him, and later for Wright to take a one-third interest with him and Chadbourne, Gamble ever sold or parted with his remaining one-third interest, nor that Chadbourne ever parted with his one-third interest, unless they lost them through the legerdemain of Wright, Hanchett and Canda in shifting to the

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name of Hanchett the option, not yet expired, in which Gamble and Chadbourne were part owners, or by taking a new agreement in the name of Hanchett.

When one in a fiduciary capacity seeks to have the right and property held jointly by him and others forfeited, he may generally believe that it belongs to him alone if he obtains the title in his own name. But the rights of the parties cannot be properly determined by the belief of Hanchett or Canda or the self-serving statements of Hanchett or any one else. The law is well settled that partners, persons interested in a joint adventure or as agents, must act in good faith for the protection of the rights of their associates, and equity will not permit one by trick or by obtaining an agreement or title in his own name to deprive others of their interest. It is legitimate for one of the parties to take a contract of conveyance in his own name for the benefit of the others, and with the intention of holding it for the rights of his associates; but when, as is evident in this case, an option is shifted to the name of one of the parties, or by one of the owners to another person who knows that it has been secured by or belongs to the real owners, for the purpose of depriving the others of their interests, it is more than constructive fraud, and is actual and intentional fraud, although the parties perpetrating it believe they can hold the entire right and that the others will no longer have any interest.

Canda, after having been put in position to negotiate with Wright and Hanchett through the efforts and expenditures of Gamble, and knowing that Gamble, Chadbourne, and Wright had become owners in the option, may have believed that by giving a new contract in the name of Wright, or by canceling or taking up the contract which had been given to Wright while he was a party in the venture with Gamble and Chadbourne, and executing a new contract in the name of Hanchett, any rights which Gamble or Chadbourne had in the option would be eliminated; but in the light of many decisions such is not the law, and his belief

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could not affect the rights of the parties. Under the usual presumption that an existing condition is presumed to continue until the contrary is shown, the interests acquired by Gamble, Chadbourne, and Wright would remain in them until something arose to indicate the contrary. As soon as Wright took an interest with Gamble and Chadbourne and became a party to the venture, and when Hanchett acted for Wright and Chadbourne, and at the expense of Chadbourne, Gamble, and Wright in securing an extension and new agreement, Wright and Hanchett became bound to act in good faith for the protection of Gamble and Chadbourne, and any agreement acquired by them, whether in their individual names or otherwise, giving an extension of the option, was for the benefit of the other parties in interest, or for Gamble and Chadbourne to the extent of their proportions.

The law gives these rights, and they do not depend upon any such considerations as some slight discrepancy in the incompetent and improperly admitted evidence regarding statements of Hanchett and Canda, in the nature of conclusions and self-serving, as to whether Gamble and Chadbourne had any interest in the contract executed in the name of Hanchett. The contract which Hanchett secured in his own name by collusion with Wright, before the expiration of the contract given in the name of Wright, was held by him in trust for them or in fraud of their rights. The rights of Gamble and Chadbourne ought not to be lost or controlled by any assertions or beliefs of Hanchett or Canda. And although Canda, Blair, and the Silver Peak Mines had notice of these fiduciary relations and of all the necessary facts, which showed that in law Gamble and Chadbourne held and continued to hold their interests, it is immaterial whether that corporation had such notice, for no more could be required of it than compliance with its agreement, which would be the same whether Hanchett alone or others were the real owners of the option.

In *Botsford v. Van Riper*, 33 Nev. 191, in the opinion by Justice Sweeney, concurred in by Chief Justice Norcross

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and a full court, it is said: "The law is well established that property purchased or acquired in connection with a joint adventure or profits realized from a joint adventure of the joint property of the parties interested, where one party holds title to the same, that such property is held in law to be the property of his associates, and the party holding the same is holding their proportionate share as trustee for them. (23 Cyc. pp. 453-459; *Hayden v. Eagleson*, 15 N. Y. St. Rep. 200; *Frieschsel v. Bellesheim*, 14 N. Y. St. Rep. 610; *Richardson v. McLean*, 80 Fed. 854, 26 C. C. A. 190; *Morris v. Wood*, 35 S. W. 1013; *Lyles v. Styles*, 15 Fed. Cas. 1143, No. 8,625; *Cunningham v. Davis*, 47 S. W. 140; *Matthews v. Kerfoot*, 64 Ill. App. 571; *Jones v. Davis*, 48 N. J. Eq. 493, 21 Atl. 1035; *Spier v. Hyde*, 92 App. Div. 467, 87 N. Y. Supp. 285; *Calkins v. Worth*, 215 Ill. 78, 74 N. E. 81; *Putnam v. Burrill*, 62 Me. 44; *McCutcheon v. Smith*, 173 Pa. 101, 33 Atl. 881; *Getty v. Devlin*, 54 N. Y. 403; *Church v. Odell*, 100 Minn. 98, 110 N. W. 346; *Knapp v. Hanley*, 108 Mo. App. 353, 83 S. W. 1005; *Hancock v. Tharpe*, 129 Ga. 812, 60 S. E. 168; *Reilly v. Freeman*, 1 App. Div. 560, 37 N. Y. Supp. 570; *Marston v. Gould*, 69 N. Y. 220; *Humburg v. Lotz*, 4 Cal. App. 438, 88 Pac. 510; *Williams v. Love*, 2 Head, 80, 73 Am. Dec. 191; *King v. Wise*, 43 Cal. 628.)

"We further find that the law is well established that the relation between joint adventurers is fiduciary in its character, and the utmost good faith is required of the trustee, to whom the deal or property may be intrusted, and that such trustee will be held strictly to account to his coadventurers, and that he will not be permitted by reason of the possession of the property or profits, whichever the case may be, to enjoy an unfair advantage, or have any greater rights in the property by reason of the fact that he is in possession of the property or profits as trustee than his coadventurers are entitled to. The mere fact that he is intrusted with the rights of his coadventurers imposes upon him the sacred duty of guarding their rights equally with his own, and he is required to account strictly to his coadventurers, and, if

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he is recreant to his trust any rights they may be denied are recoverable. (23 Cyc. 455; *Cole v. Bacon*, 63 Cal. 571; *Hambleton v. Rhind*, 84 Md. 456, 36 Atl. 597, 40 L. R. A. 216; *Seehorn v. Hall*, 130 Mo. 257, 32 S. W. 643, 51 Am. St. Rep. 562; *Scudder v. Budd*, 52 N. J. Eq. 320, 26 Atl. 904; *Getty v. Devlin*, 54 N. Y. 403; *Hollister v. Simonson*, 18 App. Div. 73, 45 N. Y. Supp. 426; *Reilly v. Freeman*, 1 App. Div. 560, 37 N. Y. Supp. 570; *Delmonico v. Roudebush*, 5 Fed. 165; *Morris v. Wood*, 35 S. W. 1013; *Knapp v. Hanley*, 108 Mo. App. 353, 83 S. W. 1005; *O'Hara v. Harman*, 14 App. Div. 167, 43 N. Y. Supp. 556; *Calkins v. Worth*, 215 Ill. 78, 74 N. E. 81; *King v. Wise*, 43 Cal. 628.)

"Counsel for appellant seem to lay stress on the fact that by reason of the appellant putting up most of the costs in putting through this deal, and the fact that the respondents were financially embarrassed, that this is a further proof indicative of the weakness of or lack of the consideration of the agreement sought to be enforced. As before stated, the mere mutual promise of the parties furthering and rendering their aid, advices, and suggestions, if agreed to, was sufficient consideration to support the contract under joint adventure; but the law is well established that the furnishing of capital by the parties to a joint adventure is not necessary to the validity of the contract, so long as the original agreement on which the contract was entered into was carried out. (*Boqua v. Marshall*, 88 Ark. 373, 114 S. W. 714; *Van Tine v. Hilands*, 131 Fed. 124.) The evidence discloses, and the findings of the lower court are to the effect, that the respondents performed their part of the contract entered into, and stood ready at all times to further aid, as far as lay in their power, pursuant to their agreement, the consummation of the deal originally agreed upon. That they were not called upon to do so by appellant is not sufficient reason in law or equity to invalidate their right to share in the profits of the deal, because the appellant saw fit to take the reins and do most or all of the work himself after the original agreement was made and entered into.

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The fact that it required large sums of money to carry the deal through, counsel for appellant seem to believe, vitiates the consideration of the agreement alleged, for the reason it is admitted respondents were practically penniless. We fail to see any merit in this contention."

The opinion of Justice Norcross in *Costello v. Scott*, 30 Nev. 43, is also worthy of consideration.

In the case of *Hunt v. Patchin*, 35 Fed. 816, there were three owners as tenants in common of mining claims in Lincoln County, and by failure to do the annual work there was a forfeiture. The relocation by one of the owners was adjudged to be in trust for the others. In the course of the opinion, Judge Sawyer said: "I am entirely satisfied that these claims were relocated under the new names at the time for the benefit of all the original owners, or else they were located in bad faith by the defendant, after giving his associates, by his conduct, the right to believe, and when they did believe, that the location was for the benefit of all. Under this state of facts, I am clearly of the opinion that a trust arises in favor of complainant under the operation of law."

In *Lakin v. Mining Co.*, 11 Sawy. 238, 25 Fed. 337, a case similar, but not exactly like this, it was held that: "Where one party wrongfully obtains the legal title to land, which in equity and good conscience belongs to another, whether he acts in good faith or otherwise, he will be charged in equity as a constructive trustee of the equitable owner. Can it be doubted, on the facts as they appear in the pleadings and evidence, that defendant got whatever title he has to the interest of complainant and Jones in the mines in question through a breach of faith and confidence? It seems to me not. He must therefore be charged as trustee of their interests."

In the case of *Royston v. Miller*, 76 Fed. 50, involving the Kingston mines near Austin, Judge Hawley held that a coowner who undertakes to do the work necessary to hold mining claims cannot acquire any interest in them against his coowners because of the failure to do such work.

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As said regarding joint adventures in 23 Cyc. 454, 455: "If no date is fixed by the contract for the termination of the adventure, or its termination is dependent upon the happening of a contingency, the agreement remains in force until the purpose is accomplished, or the happening of the contingency, and neither party can end it at will by notice or otherwise. * * * Where property is purchased as a joint venture, it is not material in whose name the title is taken, as any one holding the title will be regarded as trustee for his associates. * * * Persons united for a common purpose must be loyal to that purpose and each other. None may, without the consent of all the associates, appropriate to his own use the common property, or by any dealing therewith secure an unfair advantage over those interested with him. An advantage or profit secured by one inures to the benefit of all. * * * Those aiding him in procuring an advantage may, in equity, be held equally liable with him for the fraud." See, also, the note in 17 Ann. Cas. at page 1022.

In *Trice v. Comstock*, before the Circuit Court of Appeals, 121 Fed. 622, 57 C. C. A. 648, 61 L. R. A. 176, it is said in the opinion: "For reasons of public policy, founded in a profound knowledge of the human intellect and of the motives that inspire the actions of men, the law peremptorily forbids every one who, in a fiduciary relation, has acquired information concerning or interest in the business or property of his correlate from using that knowledge or interest to prevent the latter from accomplishing the purpose of the relation. If one ignores or violates this prohibition, the law charges the interest or the property which he acquires in this way with a trust for the benefit of the other party to the relation, at the option of the latter, while it denies to the former all commission or compensation for his services. * * * And, within the prohibition of this rule of law, every relation in which the duty of fidelity to each other is imposed upon the parties by the established rules of law is a relation of trust and confidence. The relation of trustee and *cestui que trust*, principal and agent, client and attorney,

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employer and employee, who through the employment gains either an interest in or a knowledge of the property or business of his master, are striking and familiar illustrations of the relation.

"From the agreement which underlies and conditions these fiduciary relations, the law both implies a contract and imposes a duty that the servant shall be faithful to his master, the attorney to his client, the agent to his principal, the trustee to his *cestui que trust*, that each shall work and act with an eye single to the interest of his correlate, and that no one of them shall use the interest or knowledge which he acquires through the relation so as to defeat or hinder the other party to it in accomplishing any of the purposes for which it was created. (2 Sugden on Vendors, 8th Am. ed. 406-409; Mecham on Agency, pp. 455, 456; *Tisdale v. Tisdale*, 2 Sneed, 596, 608, 64 Am. Dec. 775; *Ringo v. Binns*, 10 Pet. 269, 280, 9 L. Ed. 420; *McKinley v. Williams*, 74 Fed. 94, 95, 20 C. C. A. 312, 313; *Lamb v. Evans*, 1 Chan. Div. 218, 226, 236; *Connecticut Mutual Life Insurance Co. v. Smith*, 117 Mo. 261, 295, 22 S. W. 623, 38 Am. St. Rep. 656; *Van Epps v. Van Epps*, 9 Paige, 237, 241; 1 Levin on Trusts, 246, 180; *Davis v. Hamlin*, 108 Ill. 39, 49, 48 Am. Rep. 541; *Winn v. Dillon*, 27 Miss. 494, 497; *People v. Township Board*, 11 Mich. 222, 225; *Grumley v. Webb*, 44 Mo. 444, 454, 10 Am. Dec. 304; *Lockhart v. Rollins*, 2 Idaho, 540, 21 Pac. 413; *Eoff v. Irvine*, 108 Mo. 378, 383, 18 S. W. 907, 32 Am. St. Rep. 609; *Robb v. Green*, 2 Q. B. 315, 317; *Louis v. Smellie*, 73 Law Times, 224, 228; *Gardner v. Ogden*, 22 N. Y. 327, 343, 350, 78 Am. Dec. 192.)"

If Wright had not become associated with Gamble and Chadbourne as a party to the venture and part owner in the option which Gamble had secured, and if Hanchett had not undertaken to act in confidential relation for the parties in securing the new contract or extension given to Wright, he would have been at liberty to have taken in his own name and for his exclusive benefit a new contract from the Silver Peak Mines if the option secured by Gamble and the agreement sent to Wright had expired,

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and a judgment against him under such a contract would have terminated all rights under it if the court had jurisdiction. But as Wright, under his agreement with Gamble and Chadbourne, had become a party to the venture with them and a part owner of the option secured by Gamble, and as Hanchett had undertaken to act for the others in securing the extension and new contract in the name of Wright, the one which he and Hanchett later secured in the name of Hanchett by having the one in the name of Wright surrendered before it had expired inured to the benefit of Gamble and Chadbourne to the extent of the proportions to which they were formerly entitled under their agreement with Wright, regardless of whether there was any intention by Wright or by Hanchett or Canda to defraud Gamble and Chadbourne of their rights, although such intention is shown, and regardless of whether by these practices Wright and Canda believed that they had cut off the rights of Gamble and Chadbourne by eliminating their names in the new agreement, and regardless of anything that Hanchett or Canda said or believed regarding Gamble having no further interest.

Even more unwarranted than basing the decision of this court on a judgment of the federal court, which appears to have been without jurisdiction, is the claim that Gamble had no interest in the contract executed in the name of Hanchett because Hanchett and Canda testified that Hanchett told Canda that Gamble had no interest in the contract. Such evidence was not even properly admitted, and should not have been given any weight. It was not for Hanchett when, through selfish motives, seeking to deprive Gamble of his rights in options obtained from the Silver Peak Mines, to make the law for this court by declarations in his own favor. Back of these assertions the facts prevail over mere declarations of self-interest.

Although there may be a variance in the bare statement as a conclusion of Hanchett that Gamble had no interest

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and of Gamble that he had an interest, there is no dispute in regard to the controlling facts, which show that Gamble had, and that Hanchett, Canda, and all the parties interested knew that Gamble had, secured the option originally, and that by reason of his obtaining it and through his efforts and expenditures Chadbourne and Wright and Canda had become interested in the option, either as partners or as parties to a joint venture, to which the ordinary rules of partnership would apply, and under which each would be bound to act in good faith for the protection of the rights of the others. Under these conditions, any assertion of Canda that Gamble had no interest, whether made with the belief that he had none because Hanchett had so asserted, and any statement or acts of Hanchett or Canda in surrendering the option and executing the agreement for a new one in the name of Hanchett, whether done by either or both of them for the purpose of eliminating Gamble, could not deprive him of his right as a partner or party to the joint venture. Gamble was asserting and writing to Canda that Gamble had an interest in the final contract, and was pleading with Canda to protect him in that interest. There would be quite as much, if not more, reason for holding that Gamble had an interest in the agreement because he so asserted, as for holding that he had none because Hanchett so stated. If the declaration of Canda or Hanchett could curtail or control Gamble's rights, it should be remembered that, if there were any conflict between their declarations and that of Gamble, the determination of the lower court on such conflict should not be disturbed. (23 Cyc. 462, and Nevada cases.)

There is no testimony by Hanchett, Canda, or any one else, nor any evidence of any act or fact, which in law would deprive Gamble of the one-third interest which he admittedly retained as the original party in securing the option, and there is no evidence indicating that Chadbourne ever parted with the interest conveyed to him by Gamble. Surrendering the contract in the name of

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Wright and the giving of a new one in the name of Hanchett, obtained by the collusion of Wright and Hanchett, without any authority from Gamble or Chadbourne, and before the expiration of the contract executed by the Silver Peak Mines to Wright, which was owned by Wright, Gamble, and Chadbourne, did not deprive Gamble and Chadbourne of their interest, but equity carried it into the contract obtained in the name of Hanchett.

A court of equity, in order to do justice, need not consider seriously the contention of appellant "that each of the various options set forth in evidence constituted a separate, complete, and independent contract between the parties named therein and none others," nor the further contention that "no oral testimony could be admitted to contradict the written contract as to who were the parties to it and entitled to its benefits and privileges." The real rights of the parties could be extended equally well by an agreement stating that the time for performing the conditions in an existing or previously executed agreement were extended for a certain period or by executing a new contract in similar terms to run for that period. In the negotiations "extensions" were asked for before the old contracts expired, and new contracts were obtained as "extensions" and treated as such. Whether considered an extension or a new and independent contract, the time allowed for acquiring the property would be extended and the benefits resulting would be substantially the same. If after the lapse of one of the agreements a new one in similar terms with different dates had been given to a different party, who was not standing in a fiduciary relation or acting with one of the coowners to defraud, it would belong to him exclusively; but when a new contract is obtained by one standing in a fiduciary relation, or for the purpose of defrauding real owners, it is immaterial whether it be considered a separate and independent contract or an extension, for it inures to the benefit of the equitable owners of the agreement anyway.

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Appellants' contention that the option was for the entire property is correct. The contracts were, and were intended to be, assignable. Gamble from the beginning, and the parties who acquired an interest later, were at liberty to sell at will a part or all of their interests; but no party having less than the whole could compel the Silver Peak Mines to convey to him his proportion on the payment of his share of the expense, because the Silver Peak Mines had agreed to convey the whole property, and not any fractional part thereof, and could not be compelled to convey a part only when they had not agreed to convey less than the whole. This is consistent with the principle of law which allows one of the coowners to recover the whole. As contended, the court cannot make a new agreement with conditions different from the one made by the parties.

As the agreement for the option carried the right to enter into possession, prospect the mines, and work the ore, it was to a certain extent in the nature of a lease or term ownership of real property, and the coowners in the contract were in effect tenants in common. Under the rule long recognized in this state, any one of them could bring an action in his own name for the benefit of himself and his coowners to recover the whole property. (*Sharon v. Davidson*, 4 Nev. 416; *Brown v. Warren*, 16 Nev. 288; *Nesbitt v. Delamar's Gold Mining Co.*, 24 Nev. 273, 77 Am. St. Rep. 807; *Union M. & M. Co. v. Dangberg*, 81 Fed. 87; note, 7 Ann. Cas. 999.) The law in allowing one tenant in common to bring an action to recover for the benefit of all does not deprive any one of his rights without his day in court. In an action by all or any of them against the Silver Peak Mines, the latter is not concerned regarding the particular part or the amount of the fractional interest held by Gamble, the original plaintiff, or the other parties to the option or contract. As soon as it appeared that any one of them had an interest in the contract, however small, he became entitled to demand and have possession and to exercise the option upon payment of the full amount and compliance with

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the terms of the agreement. Payment or performance of the conditions of the contract by any one of the parties ought to be satisfactory to the Silver Peak Mines, which should not complain if there was not compliance by Hanchett when it was refusing to allow compliance by Gamble. The particular portion the other parties might be entitled to in case of dispute would be determinable in an action to which they were parties, or would at least require interpleading by them.

Partnership property may stand or be acquired in the name of any partner. (*Whitmore v. Shiverick*, 3 Nev. 288; *Hogle v. Lowe*, 12 Nev. 286; *Shanks v. Klein*, 104 U. S. 18, 26 L. Ed. 635; *Riddle v. Whitehill*, 135 U. S. 621, 10 Sup. Ct. 924, 34 L. Ed. 282; *Schlichter Jute Cordage Co. v. Mulqueen*, 142 Fed. 587.) Although the transactions by Gamble and his associates may not have constituted a partnership, they were in the nature of a joint adventure, or indicated ownership in common which should be controlled by the rules relating to partnership. (*Botsford v. Van Riper*, 33 Nev. 196, and cases cited; 23 Cyc. 453.) Gamble and Chadbourne continued to own their proportionate interest in the contract and extension in the name of Hanchett. Whether Wright continued to own a one-third interest for which he agreed with Gamble and Chadbourne, or whether he would own twenty per cent under his agreement with Hanchett, or whether he could recover anything after entering into such a transaction with Hanchett, does not affect the right of recovery against the Silver Peak Mines. After the agreement was changed to the name of Hanchett with the intention of depriving Gamble and Chadbourne of their interest, Hanchett held as trustee for them. If this were not so, the law would aid him in defrauding them.

Questions regarding division or accounting between Gamble and his coowners are not property in this case as against the defendants-appellants, for they have no legal interest therein. (*Nesbitt v. Delamar's M. Co.*, 24 Nev. 285, 77 Am. St. Rep. 807.) Gamble ought not to be deprived of his rights by the defendants' refusal to let him in under the agreement, when they were informed

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through the knowledge of Canda, who represented John I. Blair and the Silver Peak Mines, of all the circumstances, which showed that Gamble had an interest in the agreement notwithstanding it had been changed to the name of Hanchett. Being denied the right to enter into the possession and explore the mines under the agreement to which he was a partner or part owner, and having brought suit in due time, Gamble ought not to be deprived of his rights by any action or delays of his joint owners, or by long litigation with the defendants.

As Gamble was seeking to obtain possession and the right to prospect the mines and to proceed under the option, and brought suit to obtain his rights before the option expired, and has been long delayed in that suit by the conduct of the defendants in taking the case to the federal courts, and in other ways, the fact that the Silver Peak Gold Mining Company, long after the commencement of this action, took possession of and began working the mines, is no reason why the plaintiffs should be deprived of their previously acquired rights. With the *lis pendens* on file, which under the statute operated as a notice and warning to all persons, and the notoriety given to the case through the public press, the company before attempting to purchase the property may have taken measures to protect itself from loss in any event. If not, it has no right in law or equity against the plaintiffs. Canda wrote to Wright in July, 1894, in regard to possible litigation over the mines, saying: "We will, of course, defend them until you are satisfied to pay for them." It may be assumed that the Silver Peak Gold Mining Company, in purchasing the property for \$500,000 and giving a mortgage to secure \$400,000 of the purchase price, has been able to reimburse itself and be part paid by working the ores if the mines are of great value, and that the Silver Peak Mines guaranteed the title to the Silver Peak Gold Mining Company, as Canda had offered to have done in his letter to Wright.

Gamble acted in due time and brought this action in the proper state district court before the expiration of the period for the prospecting, developing, and purchasing of

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the mines under the final agreement and extension in the name of Hanchett, and in which equitably Gamble, Chadbourne, and Wright were owners. No sufficient reason appears for holding that the plaintiffs should lose their rights by reason of the long delay since the filing of the complaint in this action on March 2, 1896. After the institution of the suit the mines were long idle, except as worked by Hanchett without expense to the Silver Peak Mines; one of the attorneys for the Silver Peak Mines became the district judge, so that the case could not be tried before him, and the plaintiffs obtained a writ of *mandamus* from this court to compel him to transfer the action to another judicial district. (*B. A. Gamble and F. S. Chadbourne v. First Judicial District Court*, 27 Nev. 233.) There were demurrers, amendments, amended and supplemental complaints filed. The Silver Peak Mines had the case transferred to and held in the federal court, making it impossible for Gamble to proceed in the state court, until it finally became apparent by the decision of the Supreme Court of the United States in the *Wisner* case, 203 U. S. 449, 27 Sup. Ct. 150, 51 L. Ed. 264, that the action had been erroneously transferred to or held in the federal court, because it was without jurisdiction in a case started in a court of this state between citizens of different states when none of them were residents of this state so as to be favored by local prejudice, and the case was remanded to the state court.

The delay while the case was in the federal court was caused by the defendant the Silver Peak Mines, and if there was any blame on the part of the plaintiffs for the delay prior to that time it was waived by the defendant when it moved to have the case transferred to the federal court and went to trial without moving to have it dismissed for lack of prosecution. It is not shown whether any undue delay before the removal of the case to the federal court or since it was remanded to the state court has been occasioned by the plaintiffs or the defendants, or the court, or circumstances which the parties could

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not avoid, or whether it has been for the convenience and by the acquiescence of all the parties, or whether it has been to the detriment of any one of them, or that the plaintiffs unduly delayed the progress of the case in any way which should cause a forfeiture of their rights. As the defendants could have proceeded at will, and are not shown to have been hindered by the plaintiffs from proceeding, the defendants ought not to complain of long delays which they did not try to avoid and in which they acquiesced, and a large part of which they directly and unnecessarily caused. After the trial in the district court, the Silver Peak Mines went again to the federal court to obtain a temporary order to restrain and delay proceedings, and besides moving for a new trial and appealing came to this court for a writ of prohibition. These proceedings were in addition to the three suits against Hanchett and the two of Blair against the Silver Peak Mines.

It does not appear that the plaintiffs are to blame for the period of five years intervening since the trial in the district court, nor that the defendants have been hindered at any time from pressing the case to a final determination as rapidly as they desired and action could be secured by the court. The decision was not rendered by the district court until February, 1909. Since that time there has been a motion for a new trial and appeal argued and determined, a petition for rehearing denied after reply thereto, with delays in preparing the thousands of typewritten and printed pages in the statements on motion for a new trial and on appeal and in the briefs and transcript.

In the statement on motion for a new trial there was a specification that "the evidence shows that whatever rights the parties claimed had been forfeited by their own negligence, laches, and delay long prior to the commencement of the action." Apparently this was made on the theory that all rights of Gamble and Chadbourne had lapsed when they failed to exercise their option under the original contracts to Gamble, and that Gamble and

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Chadbourne had no interest in the agreement in the name of Hanchett. If any delay in pressing the action to trial could possibly be sufficient to cause a forfeiture of the substantial rights of the plaintiffs, by moving the case to the federal court, by going to trial in the state court, incurring the expense resulting therefrom, taking the chances on a favorable decision, and by appealing, without making any objection to delay by the respondents, and without showing that any unnecessary delay was caused by the respondents in which the appellants did not acquiesce, and by failing to show that the appellants were in any way injured by the delay, and by failing to take any exception or make any specification of error in regard to delay, objection was waived to any undue delay on the part of the plaintiffs in pressing the action to trial, if there was any such delay, which is not shown. As there is no specification of error in regard thereto, the question of undue delay is not in the case except as it is injected and considered in the majority opinion as one of the grounds for reversal of the judgment.

The decisions of the Supreme Court of the United States relating to laches, cited to sustain the opinion of the majority of the court, have no application to the facts in this case, which bears no resemblance to those actions, in that there were good reasons for dismissal which did not appear in this suit. In the case of *Johnston v. Standard Mining Co.*, 148 U. S. 360, 13 Sup. Ct. 585, 37 L. Ed. 480, after more than four years two actions were brought, one of which was dismissed for lack of jurisdiction and the other because of defective summons, and the case which was finally brought and held to be too long delayed was not started for over five years and was for the recovery of an interest in a mining claim.

In the case of *Willard v. Wood*, 164 U. S. 525, 17 Sup. Ct. 176, 41 L. Ed. 531, the process was issued and served nearly sixteen years after the making of the agreement and over eight years after the filing of the bill. The delay in both of these cases was beyond our statute of limitations, which is five years for real estate and two years for

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mining claims. How very different are the circumstances in this case, where the action was brought promptly and long before the expiration of the time for the fulfillment of the agreement or the exercise of the option, and where, as far as appears, the delay was caused by the disqualification of the district judge and by the time taken by the courts to prepare, hear, consider, and determine the motions, removals, and proceedings involved, including the trial, motion for a new trial, appeal and applications for writs. If there had been any such delay in bringing this action as in those cases, it would, if properly asserted, constitute good ground for denying relief to the plaintiffs. The Supreme Court of the United States has not held, and it is safe to assume never will hold, that a litigant loses his rights by laches when he is denied the rights under his option and commences action to recover before the option expires and the delay is caused by the conduct of the opposite party or the court. If Gamble had not brought suit until after the option had expired, and it were shown by proper allegation and proof that the defendants, without notice of his claims or that he intended to bring suit, had been lulled into making large expenditures and had opened up valuable bodies of ore and greatly enhanced the value of the mines before he commenced suit, instead of devoting their activities for many years to resisting the plaintiffs, and he had then sought to enforce the agreement, there would have been good reason for holding that the suit was brought too late.

The federal courts, under a different practice and in a few isolated cases, may have arbitrarily dismissed actions when the facts stated in the bill or complaint indicated laches or unjustifiable delay on the part of the plaintiff; but no case is found where relief is denied to the plaintiff under circumstances in anywise similar to those existing in this action. It would be the better rule, and especially under our code (Rev. Laws, 4943), which provides that "there shall be in this state but one form of civil action for the enforcement or protection of private rights, and the redress or prevention of private wrongs," and that the

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answer should contain denials and "a statement of any new matter constituting a defense or counterclaim," that in order to secure the benefit of the defense of laches, advantage of it must be taken by some appropriate pleading, or at least not without some showing that the plaintiff is guilty of laches, and not until after he has had an opportunity to refute such defense unless it is shown conclusively by the allegations of his bill. The Supreme Court of Illinois has said that the reason for the rule requiring the defendant to set up the complainant's laches is to give him an opportunity to amend his bill by inserting allegations accounting for the delay. (*Williams v. Rhodes*, 81 Ill. 571; *School Trustees v. Wright*, 12 Ill. 432; *Hall v. Fullerton*, 69 Ill. 451.)

It has been held that laches is a defense which may be made by demurrer or answer; and some of the cases hold, following by analogy the rule in regard to the statute of limitations, when the facts alleged in the complaint do not show that the action is barred, that it should be made by answer.

In *Zebley v. F. L. & T. Co.*, 139 N. Y. 468, 34 N. E. 1069, the court said: "Under our system of procedure, even where the complaint upon its face discloses a cause of action barred by the statute of limitations, the question cannot be raised by demurrer, but by answer, and certainly a party ought not to be permitted to avail himself of the objection that the demand is stale, in consequence of facts not constituting a statutory bar, on easier terms than he could avail himself of the statute of limitations. A court of equity undoubtedly may, under proper circumstances, in the exercise of discretion, decline to aid a party in the enforcement of a stale demand; but it is believed that such a result can seldom, if ever, be reached upon a demurrer to the bill, and without full examination of all the facts and circumstances of the case."

And in *Sage v. Culver*, 147 N. Y. 247, 41 N. E. 514, the court said: "It is also urged that since the complaint shows upon its face that the transactions stated were

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had many years ago, the plaintiffs are chargeable with such laches, and their cause of action, if any, is so stale that equity will decline to interfere. The answer to this point is that, if the claim or cause of action is barred by lapse of time, that defense must be presented by answer, and the mere fact that it is old is not an objection that can ordinarily be presented by demurrer."

In *Darst v. Murphy*, 119 Ill. 352, 9 N. E. 891, the court said: "We do not understand that laches in the complainant in asserting his equities is relied upon as a defense. It is not set up in the answer, as it should have been if relied upon as a defense, and is only incidentally, as it seems to us, referred to in the brief of plaintiff in error, and we refrain from further discussion of that question."

Other cases hold that, if laches is not apparent from the plaintiff's allegations in the bill, the defense cannot be raised by demurrer, but must be set up by plea or answer. (*Snow v. Boston Blank Book Mfg. Co.*, 153 Mass. 456, 26 N. E. 1116; *Warren v. Providence Tool Co.*, 19 R. I. 360, 33 Atl. 876; *Scruggs v. Decatur Mineral Co.*, 86 Ala. 173, 5 South. 440.)

Under the prior decisions of this court and of other courts the defense of laches, if not asserted in the lower court, will be considered waived and cannot be urged in the appellate court. (*Humphreys v. Butler*, 51 Ark. 351, 11 S. W. 479; *Dawson v. Vickery*, 150 Ill. 398, 37 N. E. 910; *Walker v. Denison*, 86 Ill. 142.)

In *Collins v. Insurance Co.*, 91 Tenn. 432, 19 S. W. 525, it was held that the defense that a suit in equity had been abandoned by delay in its prosecution was waived by answering to the merits. This is in harmony with the opinions of this court rendered prior to the decision in this case.

In *Iowa Mining Co. v. Bonanza Mining Co.*, 16 Nev. 64, a number of the earlier opinions of this court relating to waiver were reviewed with approval, and in the course of a carefully prepared decision it was said: "The question first presented for our consideration, then, is this:

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Conceding that appellant did not prosecute the action with reasonable diligence as required by section 2326, Rev. Stats. U. S., and that the action ought to have been dismissed, if respondent had taken the proper steps therefor before demurring and answering, was it error to enter a judgment of dismissal under the circumstances detailed above? By raising issues of law or fact, or both, did respondent waive his right to move for a dismissal of the action? Respondent claimed the mining ground described in the complaint adversely to appellant, and under the statute above referred to it was required, 'within thirty days after filing its adverse claim, to commence proceedings in a court of competent jurisdiction to determine the question of the right of possession, and prosecute the same with reasonable diligence to final judgment.' The same section also provided that 'a failure so to do shall be a waiver of his adverse claim.'

* * * In other words, answering as respondent did was a complete waiver of previous delay, if the same act would have been so, had no leave to move for a dismissal been granted. * * * Demurring and answering were tantamount to saying to the court and appellant that it was ready and willing to try those issues, and that it did not desire to take advantage of the irregularity subsequently made the ground of a motion to dismiss. They were challenges to trial notwithstanding the delay.

* * * The failure to prosecute this action with reasonable diligence consisted entirely in an unwarrantable delay in obtaining service upon the respondent; and, being such, it was, we think, only an irregularity in the time of proceeding.

"If the statute provided that a summons should be served within one month or one year after issuance, and that a failure to make such service should be deemed a waiver of the claim set up in the complaint, service thereafter would be irregular, but nothing more; and if seasonably sought, relief could be had; but should a defendant appear generally and answer the allegations of the complaint, without any reservation of his right to

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move to dismiss, such action would undoubtedly be a waiver, and he would thereafter seek in vain to take advantage of the irregularity. Filing an answer under such circumstances would be taking a step in the cause, which from its nature would assume the propriety of trying instead of dismissing it, and would be a waiver of any objections to going to trial upon the issues raised. If, without service of summons, respondent had appeared and answered, denying all the material allegations of the complaint, and after so doing had moved to dismiss, there can be no doubt that the motion would have been too late. Its answer would have been a notice, voluntarily given, of a willingness to proceed with the trial. We are satisfied that the same result follows from demurring and answering as was done in this case. The following authorities sustain the conclusion arrived at upon this branch of the case: *Pearson v. Rawlings*, 1 East, 77, wherein Lord Kenyon said: 'It is the universal practice of the court that where there has been an irregularity, if the party overlook it and take subsequent steps in the cause, he cannot afterwards revert back to the irregularity and object to it.' See, also, *D'Argent v. Vivant*, Id. 330; *Mayor v. Lyons*, 24 How. Prac. 282; *Higley v. Lant*, 3 Mich. 612; *Buel v. Dewey*, 22 How. Prac. 344; *Warren v. Glynn*, 37 N. H. 343; *Dale v. Radcliffe*, 25 Barb. 334; *Barber v. Hubbard*, 3 Code Rep. 171; *Baker v. Curtis*, 7 How. Prac. 480; *Belt v. Blackburn*, 28 Md. 240; *Crull v. Keener*, 18 Ill. 66; *Pryce v. Security Ins. Co.*, 29 Wis. 274; *Upper Miss. Trans. Co. v. Whittaker*, 16 Wis. 222; 4 Waite's Prac. 629, *et seq.*"

In that case there was a delay of about three and a half years in making service of the summons. It was properly held that by filing an answer the right to object to the delay was waived, notwithstanding the provisions of the United States statute requiring the plaintiff to commence proceedings within thirty days and to prosecute the same with reasonable diligence to final judgment, and that "a failure to do so shall be a waiver of his adverse claim." There is no statute, state or

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federal, with any such provision or penalty relating to the pending action. Penalties and forfeitures are not favored in law unless plainly prescribed, so that litigants or persons may be forewarned. Immeasurably stronger are the reasons for holding in this case, without any statute requiring diligence or prescribing a penalty for delay, that if there was any undue delay occasioned by the plaintiffs, which is not shown, it was waived by the defendants by demurring, answering, making motions, going to trial, appealing, and by making long and persistent defense on the merits without alleging or moving to dismiss because of undue delay on the part of the plaintiffs, than holding that filing an answer waived an objection as in that case, in which the delay in making service of summons was nearly twice the period of limitation which bars an action for the recovery of mines, and to its extent more than any unnecessary delay shown to have been caused by Gamble, the plaintiff in this case, although the principle is the same.

The disastrous effects resulting to the plaintiffs from the delay, trouble, and expense of litigation, by holding that there was no waiver, and that any rights of the plaintiffs were lost by delay, are far greater here than they would have been if the court had held that there was no waiver and that any rights of the plaintiff were lost in that case. It appears that there has been no undue delay on the part of the plaintiffs since the trial in the district court, and if there was any undue delay on the part of the plaintiffs before the trial, which is not shown, it was waived.

In the opinion in *Botsford v. Van Riper*, 32 Nev. 225, it is stated: "We think, also, that the point raised by counsel for appellant that the respondents, by entering into numerous stipulations heretofore referred to, which reserved no right to object or except to the sufficiency of the record, waived the right to move to dismiss, or to strike upon any grounds that were not jurisdictional. (*Henningsen v. Tonopah and Goldfield R. R. Co.*, 32 Nev. 51; *Smith v. Wells Co.*, 29 Nev. 416; *Bliss v. Grayson*, 24 Nev. 432; *State, ex rel. Curtis, v. McCullough*, 3 Nev. 213.)

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Among the other cases in this state supporting the doctrine of waiver are *Killip v. Empire Mill Co.*, 2 Nev. 44; *White v. White*, 6 Nev. 25; *McWilliams v. Herschman*, 5 Nev. 265; *Lonkey v. Wells*, 16 Nev. 271; *Hammersmith v. Avery*, 18 Nev. 225; *Truckee Lodge v. Wood*, 14 Nev. 293.

The doctrine of waiver, as established by numerous decisions of this court, including the one in the Botsford case, and supported by the learned members of this court who have written the majority opinion in this case, is a just one, and for the reasons indicated I feel in duty bound to emphatically dissent from any conclusion which may affect this action or stand as a precedent for the future, that cases may be determined and the rights of parties may be lost or judgment summarily rendered against them because of dilatoriness or long delays in the courts, or without any allegations or evidence to show any undue delay by the parties long seeking to obtain their rights. If any person seeking to obtain his rights starts an action, and after delay for many years, or nearly a generation as in this case, resulting as far as shown from the fact that defendants are nonresidents, making service more difficult, from the disqualification of the district judge of the court in which the action is brought, from the removal of the case to the federal court by the defendants, remanding and trial in the state court, motion for a new trial and other motions, appeal, proceedings in other courts brought by able lawyers apparently for the purpose of preventing or delaying the final determination on the merits of the case in the state court, may have the case arbitrarily dismissed in this court without warning, pleading, or showing, on the ground that he is guilty of laches, notwithstanding all his efforts to obtain a judgment establishing his rights, no litigant need feel assured that he can obtain protection from the courts when he may be strenuously opposed and delayed by the arts known to the legal craft and counsel employed by a wealthy defendant.

When an action is brought within the time prescribed by the statute of limitations, and service of process is made on the defendant within the time required by the

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act of the legislature, and the defendant has thereby been brought into court and is as free to press the litigation to a final determination as the plaintiff, under many well-reasoned decisions the defendant acquiesces in and cannot take advantage of the delay. There is no case to be found in the books since equity courts were established to award justice to men, in which the circumstances are similar, or which approaches this one, in which a complainant has been denied relief by reason of laches or delay. In justice to the district court, as well as to the plaintiffs, any objection to delay in that court should have been made there, where the circumstances could be better known and determined, and before waived by answering and going to trial. When not shown by the complaint, the defendant should at least be required to allege in some appropriate way, and prove, that there was undue delay for which the plaintiff was blamable, and the latter should have an opportunity to meet and disprove the claim before equitable relief is denied by any court on that ground.

Although it is now conceded that the federal court properly remanded this action to the state court and that the federal court has no jurisdiction over Gamble and the plaintiffs in this case, to which they are parties, it is claimed that his rights, if any, under the option and questions regarding them, have been determined conclusively against him in later suits brought by the Silver Peak Mines against Hanchett in the federal court, to which the plaintiffs were not parties. In support of this contention the United States circuit judge has temporarily enjoined the state district court of Washoe County from proceeding with this case. But with the admission an order made by the federal court in obedience to the decision of the highest tribunal in the Wisner case, how can it be claimed that the rights of the plaintiffs here were finally adjudicated against them in an action in the federal court in which they were not parties, and in which no issue relating to their claims or their right to a decree allowing them to comply with the conditions of

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the agreement and to exercise the option it carried was presented or considered?

Notwithstanding the high regard we have for the opinions of the federal courts, and especially for the decisions of that eminent jurist who wrote the recent opinion for the Circuit Court of the United States in the proceeding brought there to enjoin the district court in the enforcement of the judgment in this case, this court should not feel constrained to follow any decision which is obviously erroneous and in conflict with the opinions of other federal courts, including the Supreme Court of the United States, when it would result in the denial of justice to litigants in this court pertaining to matters over which the jurisdiction is exclusively in the courts of this state and not in the federal court. However, the opinion on the temporary injunction should be regarded as only temporary, and, as usual in granting a temporary injunction, made without full hearing and knowledge of all the facts or deliberative consideration, and intended to hold proceedings in abeyance until such time as a final hearing and fuller investigation and proper determination may be had. It need not be assumed that the distinguished judge of the intermediate federal court who granted the temporary injunction against the district court, which is under the supervision and deserving of the protection of this court, will finally order that the temporary injunction be made permanent, nor that the Supreme Court of the United States would fail to restrain the enforcement of such an injunction on the ground that the federal courts are without jurisdiction because the jurisdiction over the parties is in the state courts, as heretofore held by the federal court.

There are important questions in the case which may not have been presented to or considered by the learned judge who reached these conclusions. If the federal court in a state in which neither of the parties were inhabitants had any jurisdiction in the case against Hanchett, and if he were the only necessary defendant party to determine the rights under the contract, and

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the plaintiffs in this action were claiming anything under Hanchett, the conclusion reached would undoubtedly be correct. If the judgment is good against Hanchett, it is good against every one claiming under him. But no one is claiming under Hanchett. The plaintiffs are seeking a decree for their previously initiated rights under an agreement which was fraudulently shifted to the name of Hanchett. Under the decisions of the federal and state courts, Gamble and Chadbourne were part owners of the option or agreement in the name of Hanchett. The Silver Peak Mines had notice of the facts which in law made Gamble and Chadbourne such owners in the contract. Their rights in the contract were as complete as if they had been named as parties to it. They were as necessary parties in an action by the Silver Peak Mines to terminate the contract as if they had been named as parties to the contract, or as if Hanchett had assigned them an interest in the contract before the institution of the suit and they had given notice of the assignment. As the others were owners in the contract and were necessary parties in any suit to foreclose it, even Hanchett's interest was not terminated by the judgment against him if the federal court had jurisdiction. To finally hold that Gamble and Chadbourne are bound by the judgment against Hanchett would deprive them of their rights in derogation of the constitutional guaranties known to every lawyer, under which no person is to be deprived of property without due process of law or an opportunity to have his day in court. As the Silver Peak Mines had knowledge of the facts and notice of the claims of Gamble, Chadbourne, and Wright, if it desired to have them bound by the judgment in the action it brought against Hanchett alone, it should have made them parties to that suit and given them an opportunity to defend or to assert that the jurisdiction was in this action, which was the first to be instituted.

If under the act of Congress of March 3, 1887 (sec. 1, c. 373, 24 Stat. 552, U. S. Comp. St. 1901, p. 508), providing that actions between citizens of different states should not be brought in any other district than that

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whereof one of them was an inhabitant, and under the decision in the Wisner case, 203 U. S. 449, 27 Sup. Ct. 150, 51 L. Ed. 264, the federal courts of New York and Nevada had any jurisdiction in the action brought by the Silver Peak Mines, a corporation organized under the laws of New York, against Hanchett, a resident of California, the rights and claims of Gamble, Chadbourne, and Wright could not be curtailed or affected in a suit to which they were not made parties. More than a year prior to the institution of that action the complaint had been filed by Gamble in this suit against Hanchett, Wright, Chadbourne, George Crocker, and the Silver Peak Mines, and the *lis pendens* filed, giving notice to the world that Gamble asked to be decreed the owner and entitled to the possession of a one-third interest in the contract, and that he was entitled with the defendants holding the contract, upon the fulfillment of the terms of the agreement with the Silver Peak Mines, to a conveyance of the property mentioned in the agreement. This was in addition to the notice personally given by Gamble to the Silver Peak Mines that he, Chadbourne, and Wright were the owners of the agreement executed in the name of Hanchett.

The assumption that the rights of Gamble and others were cut off under the judgment against Hanchett is erroneous, not only because Gamble and the others known to have an interest in the option were not made parties to the suit and had no opportunity to defend, but because no issue as to whether Gamble, Chadbourne, and Wright had an interest in the option was presented or determined in the federal court, and because the federal court in this state had no jurisdiction in an action against him by a resident of New York or New Jersey when he was a resident of California and was not made a party and did not appear. If instead of having a right antagonistic to Hanchett, Gamble and Chadbourne held in privity to Hanchett, or had been made parties to the suit brought by the Silver Peak Mines against him, the judgment in that case would not affect the rights they assert here; not only because their claims were not in issue in

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the pleadings in that action, but because the jurisdiction would be in this case, for the reason that it was the first one commenced.

If the federal court ever had or has any jurisdiction over these plaintiffs, necessarily it is in this action and not in the one brought by the Silver Peak Mines against Hanchett, because this case was the first one brought, because it is the only one in which the plaintiffs were parties, because it is the only one in which the issues involved here were presented or determined, and because this case was removed to the federal court in due time if that court has jurisdiction. As against these salient reasons, none appear for holding that the rights of these plaintiffs were lost clandestinely in an action to which they were not made parties and in which their claims were not presented or considered.

It is elementary that parties in interest must be made parties before their rights can be adjudicated in an action by a party having knowledge of their interest and notice of their claims. The judgment is not binding on persons who were not made parties to the action, and not even on parties to the action if others who were not included were necessary parties. (*Keller v. Blasdel*, 1 Nev. 491; *Hollingsworth v. Barbour*, 4 Pet. 466, 7 L. Ed. 922; *St. Clair v. Cox*, 106 U. S. 353, 1 Sup. Ct. 354, 27 L. Ed. 222; *Cockburn v. Thompson*, 16 Ves. 321, 326; *Adair v. New River Co.*, 11 Ves. 429; *Wendell v. Van Rensselaer*, 1 Johns. Ch. 349; *Wiser v. Blachly*, 1 Johns. Ch. 437; *Brasher v. Van Cortlandt*, 2 Johns. Ch. 245, 247; *West v. Randall*, 2 Mason, 190, Fed. Cas. No. 17,424; *Hallett v. Hallett*, 2 Paige, 15; *Joy v. Wirtz*, 1 Wash. C. C. 517, Fed. Cas. No. 7,554; *Elmendorf v. Taylor*, 10 Wheat. 152, 6 L. Ed. 289; *Crocker v. Higgins*, 7 Conn. 342; *Robinson v. Howe*, 35 Fla. 81, 17 South. 370; *Con. Water Co. v. San Diego*, 93 Fed. 851, 35 C. C. A. 631, and cases cited.)

In his work on Judgments (vol. 1, sec. 220), Mr. Black says: "A personal judgment rendered against a defendant without notice to him, or an appearance by him, is without jurisdiction and is utterly and entirely void."

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In *Gregory v. Stetson*, 133 U. S. 579, 10 Sup. Ct. 422, 33 L. Ed. 792, the complainant sought to obtain a decree declaring a note to be held in trust and adjudging him to be the owner thereof. The Supreme Court of the United States held that in equity all persons materially interested either legally or beneficially in the subject-matter of the suit must be made parties, and that a court cannot adjudicate directly upon a person's right without having him either actually or constructively before it.

The doctrine of *res judicata* applies only to matters in issue. (*Deal v. Schlomberg*, 20 Nev. 330; *House v. Lockwood*, 137 N. Y. 259, 33 N. E. 595; *Neilson v. Pennsylvania Coal and Oil Co.*, 78 Minn. 113, 80 N. W. 859.)

In *Union M. & M. Co. v. Dangberg*, 81 Fed. 74, it was held that: "Former decrees which are final and unreversed are *res judicata* of the subject-matter of the suits as then decided between the parties thereto and their successors in interest. * * * They are not conclusive as to matters which might have been decided therein, but only as to such matters as were in fact decided within the issues raised by the pleadings."

In *Smith v. Town of Ontario*, 4 Fed. 386, it was held that: "The former adjudication is an estoppel only as to the matters in issue or points in controversy, upon the determination of which the finding or verdict was rendered. The matter in issue or point in controversy is that ultimate fact or state of facts in dispute upon which the verdict or finding is predicated."

At section 614, volume 2, of Black on Judgments, it is said: "We have now seen that the estoppel of a judgment does not extend to such matters as come only incidentally or collaterally into the controversy, but only to points actually and necessarily adjudicated. In other words, that a former judgment is conclusive only as to the matters in issue or points in controversy, upon the determination of which the finding or verdict was rendered."

The judgments against Hanchett in actions in the federal courts regarding matters in dispute between him

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and the Silver Peak Mines, pertaining to whether he had complied with the agreement, or had failed to account for royalties, or had injured the property, cannot properly be held to be a determination of the issues involved in this case between different parties and concerning different matters. The controlling questions here as to whether Gamble, Chadbourne, and Wright were parties to the joint venture, and as such entitled to an interest in the agreement and extension fraudulently obtained by Wright and Hanchett in the name of Hanchett for the purpose of eliminating Gamble and avoiding an agreement to carry his interest without expense, and with the knowledge and assistance of the Silver Peak Mines, and whether the Silver Peak Mines has wrongfully deprived Gamble of the opportunity of exercising his rights under the agreement and option, were not presented, considered, or determined in the actions brought in the federal courts, and consequently any judgment determining these issues in the state court is not in conflict with the judgments in the federal courts. If the same issues had been presented, tried, and determined in the case of the Silver Peak Mines against Hanchett which are involved in this action, their determination in that case would not have been binding upon the plaintiffs here, because there was no privity between the plaintiffs here and Hanchett, who was acting in hostility to them and was endeavoring to deprive and defraud them of their rights, and because the plaintiffs here would have been necessary parties in determining these issues, which are hostile to the claims of Hanchett.

It would be dangerous indeed to hold that in every or any case where an unfaithful partner, agent, or trustee takes a deed in his own name, or in the name of some one acting fraudulently with him, for property or rights paid for with the funds or belonging to his principal or others, the agent, partner or trustee, or party acting with one of the partners to defraud the others, could by collusive or other suit against parties having notice of the claims of the real owner, but in which he is not a party and has no

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opportunity to present his claims or litigate his rights, secure a judgment which would be binding on the owner. Although Hanchett acted as agent for Chadbourne and Wright in securing the agreement or extension in the name of Wright which was for the benefit of Gamble, Chadbourne, and Wright, he did not act as agent when, in collusion with his son-in-law, Wright, he secured the agreement or extension in his own name for the purpose of depriving and defrauding Chadbourne and Gamble of their interest.

If plaintiffs here claimed anything by assignment or privity from Hanchett after a judgment against him in a court of competent jurisdiction, rendered when the necessary parties were before the court, they could be prevented from enforcing such claim. What plaintiffs demand is not from Hanchett, but an interest in an option or venture which belonged to them before Hanchett was connected in any way with the enterprise. Although they were interested in the contract, they were not parties nor in privity under any judgment obtained against Hanchett in a suit on the contract. They were not grantees of Hanchett. Their rights did not come from him, and consequently they could not be bound by any judgment against him in an action to which they were not made parties. As there is no question regarding a silent partner or party to the venture, or undisclosed agent, and as Canda and the Silver Peak Mines had knowledge of the facts and participated in the transactions which in law gave the interests to Gamble, Chadbourne, and Wright, and were informed of Gamble's claims by letters and by the *lis pendens* filed by him in this action long before the commencement of the suit by the Silver Peak Mines against Hanchett, Gamble and Chadbourne were as necessary parties to the suit of the Silver Peak Mines against Hanchett as if they had been directly named as parties in the contract given in the name of Hanchett, or as if they had held assignments each of a one-third interest from Hanchett in that

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contract and had given notice to the Silver Peak Mines of such assignment.

If the opinion granting the temporary injunction were made final, inconsistency would result from the fact that after this action in which Gamble is plaintiff was taken into the federal court Judge Hawley refused to remand to the state court, but after the decision in the United States Supreme Court in the Wisner case and by the United States Circuit Court of Appeals in the Cucciarre case, 163 Fed. 38, 90 C. C. A, 220, Judge Farrington remanded this case to the state court because the federal court had no jurisdiction in an action in which Gamble was a party against the Silver Peak Mines. The result would follow that, after the federal court had held that it had no jurisdiction over Gamble in an action in which he was a party, another federal court would hold that it had jurisdiction over him because of an action against Hanchett in which Gamble was not a party. In other words, the federal court would hold jurisdiction over Gamble and Chadbourne in an action in which they are not parties, but cannot have jurisdiction over them in a previously instituted action in which they are parties, when if there is any jurisdiction in the federal court over Gamble and Chadbourne it would be in this action to which they are parties.

A further reason why a special writ should not be issued to restrain the state court is that, after it had been determined by the federal court in remanding the case that the state court had jurisdiction to proceed, there was no appeal from that order, and it ought to be treated as final, unless void because the jurisdiction is still in the federal court. (*Mo. P. R. Co. v. Fitzgerald*, 160 U. S. 580, 16 Sup. Ct. 389, 40 L. Ed. 542.) We have the decision standing as final of one federal court that it has no jurisdiction over the controversy and parties in an action in which they are named and appear, and later of another federal court that the federal court which finally held that it is without jurisdiction did have jurisdiction and conclusively adjudicated the controversy and cut off the rights of the plaintiffs in an action in which they

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were not named, did not appear, and had no opportunity to assert their rights or defend.

If the act of Congress limits the jurisdiction of the federal court to the district in which one of the parties is an inhabitant, it may be questioned whether the foreclosure suit by Blair, a resident of New Jersey, against the Silver Peak Mines, a corporation, resident of New York, and Hanchett, a resident of California, ought not to have been brought in the state court instead of in the federal court. If under later decisions jurisdiction may be conferred by consent, this could be so only as to parties to the action. Gamble and the plaintiffs, not having been made parties to the foreclosure or other suits, all started after this action and the filing of *lis pendens*, are not in any way bound by the judgments in them. Although the mortgage to Blair was prior to the options given to Gamble, Wright, and Hanchett, their right to take the property over under the option could not be terminated without making them parties to the foreclosure suit and giving them an opportunity to pay off or to redeem from the mortgage, or to plead their option gave them the right to purchase the property clear of the mortgage.

If the agreement had provided only for an option, and payment or tender had not been made within the time allowed by its terms or by extension, any right to purchase the property by Gamble, Chadbourne, or parties to the agreement, would have expired on the date specified. It is because the contract provided for taking possession, prospecting the mines, and working the ore so that the value of the property might be better determined before exercising the option that equity ought to enforce a compliance with these provisions and give the opportunity for prospecting and examination of the mines as provided in the contract before denying the right to exercise the option.

As Gamble, Chadbourne, and Wright agreed to enter into a joint venture regarding the exploration and purchase of the Silver Peak Mines, considered equitably it ought to make no difference whether the property, option,

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agreement, or purpose sought was acquired through a natural person or corporation or by assignment and delivery of all the stock of a corporation owning the property. As the first agreement was with Blair, the owner of the corporation that owned the property, later agreements secured in the name of any party to the venture, or of any agent, should be regarded as for the benefit of all the parties to the contract. As the options were assignable and not personal, no good reason appears why the Silver Peak Mines, if willing to fulfill the agreements on its part, should object to having the conditions of the contract performed by Gamble or any of the other parties having an interest in it, or why their money or fulfillment of the agreement should not be as acceptable to the Silver Peak Mines as by any one else, except that it may have been believed that by joining with Wright and Hanchett they would be more likely to obtain and pay the desired money if Gamble were thrown out and they could avoid accounting to him for his share of any profits in the promotion or venture which had been brought about by him.

Notwithstanding notice and a knowledge of the facts which made the parties to the venture part owners in law and gave the right to any one of them as such to take over the whole property upon compliance with the contract, the Silver Peak Mines, since it adopted the course of ignoring Gamble after he had been used to interest parties who were believed to command more means for improving and making payment on the property, has persistently, in court and out, for seventeen years, sought to prevent Gamble from securing any benefit under the contract. His right to enter and prospect the property and determine whether he would exercise the option, which if not denied and opposed by the Silver Peak Mines would have extended only to the date provided in the agreement for purchasing the property under the option, has been delayed during all these years by the action of the company in refusing to recognize his interest in the agreement, and equity should now give him the

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time and opportunity to which he is entitled under the agreement and which he has been prevented from exercising by the continued resistance of the Silver Peak Mines. No blame can attach to Gamble or the plaintiffs because Hanchett failed to comply with the conditions of the option, make payment, and take over the property while the Silver Peak Mines would not recognize Gamble's or plaintiffs' rights or allow them the privileges awarded by the contract or the opportunity to fulfill its conditions. The claim that Gamble is not entitled to a decree because the time for him to act under the agreement and exercise the option has expired should not avail the defendants, for it would allow them to take advantage of their own wrong in preventing Gamble from exercising his rights under the agreement.

Notwithstanding that the performance of the contract fraudulently obtained in the name of Hanchett was not limited to him, as he was merely holding the legal title to it as trustee, and any of the owners in that contract were entitled to comply with its terms or have its requirements fulfilled so as to protect their interests, the Silver Peak Mines, while at first allowing Hanchett the privileges conferred by the agreement, and later while suing him for lack of fulfillment of the agreement, were refusing to recognize Gamble or give him or parties he might induce to join him an opportunity to comply with the contract or to prospect, work, or purchase the property. If the Silver Peak Mines had not repudiated Gamble, he would have been required to perform the conditions of the agreement and pay for the property within the time allowed by its terms or lose all rights under the agreement. By repudiating Gamble and Chadbourne and resisting and delaying this suit since it was brought by Gamble, defendants have prevented him from having the opportunity to exercise the rights under the agreement. Defendants ought not to complain that he did not exercise his rights within the time stated in the agreement when they have made it impossible for him so to exercise them, and they should not be allowed

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to deprive him of his rights by their own conduct in preventing him from exercising them. They should not complain of the delay they have caused, and should be required to give the plaintiffs its equivalent in time for performing the conditions of the agreement, for otherwise they would be allowed to take advantage of their own breach of the contract and the delay they have caused. If a court of equity is to grant relief and require compliance with the terms of such a contract, necessarily it would be after breach by the defendants, and after the time fixed by its terms for compliance has expired, when the defendants have refused to allow compliance within that time.

As equity regards that as done which ought to be done, and will require that to be done which ought to be done, and as heretofore Gamble and the plaintiffs have been prevented by the Silver Peak Mines from entering into possession or prospecting the property or from exercising the right to buy it under the agreement in the name of Hanchett, the time for the performance of the agreement should be considered as extended, and the plaintiffs should be allowed a reasonable time, at least as much as the period intervening between the commencement of this suit and the termination of the option, or as much as the time intervening between the refusal of Canda and the Silver Peak Mines to longer acknowledge the rights of Gamble and the final date allowed by the extension, in which he or the plaintiffs may exercise the privileges which were to be allowed under terms of the agreement.

Although Gamble did not bring this suit for over a year after Hanchett secured the contract in his own name, he brought it a long time before the statute of limitations had cut off his right to sue and before the extension secured in the name of Hanchett had expired, and before suit promptly endeavored to obtain recognition of his rights when he became aware that Wright and Hanchett were endeavoring to defraud him of his interest by shifting the contract and option to the name of Hanchett after Wright and Chadbourne had agreed to carry Gamble's

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one-third proportion without expense. In the meantime Hanchett was making large expenditures in prospecting and working the property and an effort to comply with the agreement, evidently expecting to reap all the benefits therefrom for himself and his son-in-law, Wright, and any delay of Gamble in bringing suit could not have prejudiced the defendants, because they were not spending money upon or attempting to work the property during any part of that period, and it was in the possession of Hanchett, claiming under the agreement in his name.

If it be admitted that Gamble, Chadbourne, and Wright were trying to promote a mining enterprise by the money of others, and that they spent only a limited amount of time and money in examining the property, having it experted, and going to and negotiating with men of means and influence, there is nothing illegal or wrong in such transactions; and as long as they complied with the terms of the contracts in which they were interested, and which had been obtained through them, in law, equity, and justice they should be as fully protected in their rights under the terms of the contracts as if they had expended or possessed millions of money. The defendants and the court cannot properly deny in advance their rights under the agreement because it may be believed that eventually they will not have or be able to obtain the means with which to purchase the property. The law is no respecter of persons, and should deny no right to the poor which it confers upon the wealthy suitor.

Our government, and every other modern, progressive government which has passed its barbaric or despotic state, is based on the principle that its citizens are equal before the law. The fourteenth amendment to the federal constitution provides that: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." Section 1 of article 1 of the state constitution declares

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that: "All men are, by nature, free and equal and have certain inalienable rights, among which are those of enjoying and defending life and liberty; acquiring, possessing and protecting property and pursuing and obtaining safety and happiness." And section 8 of article 1 that "no person shall be deprived of life, liberty or property without due process of law."

Judge Hawley, speaking for this court in *State v. Overton*, 16 Nev. 152, properly expounded the law when he said: "Courts cannot make any distinction in this respect, as to the nature of the transaction or the character of the persons engaged in it. It is their bounden duty to declare the law. 'The law knows no person; it is not made for the individual man, but for men. As the dew of heaven falls, so it bears alike upon the just and unjust.' (*State v. Pierce*, 8 Nev. 304.) It smiles and frowns upon all alike. It makes no distinctions."

I especially dissent from the reasons and conclusions assigned for the majority opinion, which are based on matters which are not in the record, or which are contrary to the undisputed facts or the decisions of this court and well-settled principles of law.

Such as that it is not shown that the Silver Peak Mines had notice that Gamble was an owner in the option, when the written evidence is direct and undisputed in the transcript that the Silver Peak Mines, in addition to having knowledge of the facts, actually had such notice long before the commencement of any of the suits and before the execution of the contracts and extensions in the names of Wright and Hanchett, and had not only actual but constructive, and by statute conclusive, notice by the filing of the *lis pendens* in this case long before the suits against Hanchett were started by the Silver Peak Mines; and when this suit, the first one commenced, was notice, and a failure to give notice before suit would affect only costs.

Such as that "there is nothing in the evidence warranting any conclusion of fraud or bad faith upon the part of the Silver Peak Mines toward Gamble or his associates,"

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and such as that it cannot be said to be established with any degree of certainty that Canda was informed of the alleged partnership relations entered into by Gamble, Chadbourne, and Wright as such partnership is sought to be established in this suit, when the evidence shows clearly, conclusively, and without dispute that Canda, as agent and secretary of the Silver Peak Mines, was fully aware of conditions which in law made them partners or parties to a joint venture, and that he and the Silver Peak Mines by shifting the agreement to the name of Hanchett and by resisting the claims of Gamble have long endeavored, and the Silver Peak Mines are still endeavoring, to deprive and defraud him of his rights.

Such as that there is no proof of fraud committed by the Silver Peak Mines, while under the undisputed facts, of which the Silver Peak Mines had knowledge, and under the decisions of this court applicable to those facts, it would be the sanctioning of fraud by the court if the Silver Peak Mines is allowed to succeed in the effort which it has made for so many years to prevent Gamble from exercising his rights under the agreement executed in the name of Hanchett.

Such as that Gamble and Chadbourne had no interest in the agreement or extension in the name of Hanchett because Hanchett and Canda may have so stated, when their statements were hearsay and self-serving and not properly in the case, and could not overcome or affect the undisputed facts, which under the decisions of this court show that Gamble and Chadbourne and Wright did have an interest, and when Hanchett and Canda should not be allowed to make the finding and conclusion for this court in support of their own fraudulent acts, contrary to the undisputed evidence in the case, the finding of the district court, and these decisions.

Such as that Gamble, Chadbourne, and Wright were trying to promote a mining enterprise upon the money of others, when it was entirely legitimate for them to do so and the Silver Peak Mines was informed from

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the beginning of the transactions that such was their intention.

Such as "that Gamble, Chadbourne, and Wright either did not have the money themselves to put into the venture, or did not propose to risk any considerable amount thereof to carry out the options," when, regardless of whether they had much or little money, they were entitled to have the agreement complied with and to be allowed to enter into possession, prospect and examine the property, and determine its value before buying it or before the denial of their right to induce others to buy it.

Such as that "the Silver Peak Gold Mining Company, the present owner of the property, is shown to have purchased it upon the faith of certain judgments rendered by the Circuit Court and the Circuit Court of Appeals," when the suits in which these judgments were rendered could not in any way properly affect the rights of Gamble, Chadbourne, or Wright, because they were not parties to those judgments, and previous to the commencement of the suits in which they were rendered this action had been commenced and *lis pendens* filed, which gave notice to the world and under the statute warned the Silver Peak Gold Mining Company and its successors that they could not purchase the property except subject to the rights of the plaintiffs.

Or such as that Gamble lost his rights by delay, when there is no issue or evidence in the lower court, nor in this court, showing any undue delay on the part of Gamble in bringing or pressing the suit, and no exception or assignment of error in that regard, and no showing that the delay was not caused or acquiesced in by the defendants, or that it was not incidental to the courts and the strong defense and resistance made by the defendants and beyond the control of Gamble, or that the defendants were damaged by any delay which they had not caused or in which they had not acquiesced, and when it appears that if there was any undue delay objection to it was waived by the defendants going to trial without objection, and when it is apparent that the plaintiffs are not

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responsible for the long delays in the district court since the trial and on the appeal, and that this action would not have been brought if the Silver Peak Mines had allowed Gamble the opportunity of exercising his rights under the agreement and option within the time provided by the final extension.

As said through Massey, C. J., in the opinion in *Schwartz v. Stock*, 26 Nev. 143: "This court will not indulge in presumptions against the regularity of the proceedings of the trial court. It has repeatedly held that all presumptions favor the regularity of the proceedings of that court, and that where error is alleged it must be affirmatively shown by the record before this court will reverse an order or judgment of the lower court. (*Champion v. Sessions*, 2 Nev. 271; *Nosler v. Haynes*, 2 Nev. 53; *Lady Bryan Gold and Silver M. Co. v. Lady Bryan M. Co.*, 4 Nev. 414; *Mitchell v. Bromberger*, 2 Nev. 345, 90 Am. Dec. 550; *Allison v. Hagan*, 12 Nev. 38; *Nesbitt v. Chisholm*, 16 Nev. 39; *Leete v. Sutherland*, 20 Nev. 71.)"

I concur in the order of this court reversing the judgment from which the appeal is taken; but believing that a rehearing ought to have been granted so that the views of all the different members of this court, as expressed in the opinions, and new questions suggested which ought to control in determining the controversy, might be considered and argued by opposing counsel, I dissent from the order denying the petition for rehearing. The learned district judge, now deceased, was right in his conclusion that the plaintiffs ought to recover; but the judgment being for the fractional interest claimed by the plaintiffs, instead of for the whole property, cannot be sustained upon an agreement which was entire and did not provide for an option on or the sale of any fractional interest.

As the allegations of the complaint and the undisputed evidence show that the plaintiffs are entitled to enforce the contract as to the whole property, and the parties are before the court, it would be proper under the usual

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practice and the provision of the statute for the liberal allowance of amendments to permit the plaintiffs to amend the prayer of the complaint and ask for a decree declaring the agreement and extension in the name of Hanchett to be in trust for their benefit, awarding them the right to prospect and work the mines and exercise the option to purchase the whole property, and to have judgment accordingly if the proofs upon a new trial show the same state of facts as are now disclosed by the record; the plaintiffs to be allowed as much time for examining and prospecting the property and exercising the option to purchase as they would have had under the contract if the Silver Peak Mines had not denied them these privileges, to which they were entitled as part owners under the contract, or at least as much time as intervened between the filing of the complaint in this action and the expiration of the last extension of the agreement in the name of Hanchett.

Argument for Appellant

[No. 1889]

ANTONE ZETLER, RESPONDENT, v. TONOPAH AND
GOLDFIELD RAILROAD CO., APPELLANT.

1. CARRIERS—BAGGAGE—LIMITATION OF LIABILITY.

If it be conceded that passenger carriers by specific rules which are reasonable, and not inconsistent with the statutes or with their duties to the public, and which are distinctly brought to the knowledge of the passenger, may protect themselves against liability as insurers of baggage exceeding a fixed value except upon payment of an additional compensation proportioned to the risk, a contract so limiting the amount of liability does not relieve the carrier of liability for baggage lost through its negligence.

2. CARRIERS—BAGGAGE—NEGLIGENCE—WRONG DELIVERY.

The delivery of a passenger's baggage at carrier's baggage room to a person not entitled to receive it is such negligence as makes the company liable, notwithstanding a contract limiting its liability to a fixed value.

NORCROSS, J., dissenting.

APPEAL from the Seventh Judicial District Court, Esmeralda County, Nevada; *Theron Stevens*, Judge.

Action by Antone Zetler against the Tonopah and Goldfield Railroad Company. Judgment for plaintiff; defendant appeals. **Affirmed.** [Petition for rehearing pending.]

The facts sufficiently appear in the opinion.

Campbell, Metson & Brown, Walter Shelton and Huger Wilkerson, for Appellant:

The contract contained in the ticket is binding and valid. (*Jacobs v. Central R. Co.*, 208 Pa. St. 535, 57 Atl. 982; *Rose v. Northern Pac. Ry. Co.*, 88 Pac. 767; *The Priscilla*, 106 Fed. 739; *Belger v. Dinsmore*, 51 N. Y. 166, 10 Am. Rep. 575; *Pacific Exp. Co. v. Foley*, 26 Pac. 667; *Michalitschke v. Wells, Fargo & Co.*, 50 Pac. 847; *Ballou v. Earle*, 17 R. I. 441, 33 Am. St. Rep. 881; *Hart v. Penn. R. Co.*, 112 U. S. 331, 28 L. Ed. 717; *Alair v. Northern Pacific R. Co.*, 53 Minn. 160, 39 Am. St. Rep. 588.)

H. H. Brown, for Appellant, on petition for rehearing:

On January 4, 1913, the decision and opinion was filed in this case by a divided court, affirming the judgment

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below and holding that the limitation of liability, for loss of baggage, is not binding on the respondent.

On January 6, 1913, the Supreme Court of the United States handed down its decisions and opinions in three similar cases, involving the same question, and holding that under a congressional regulation of interstate commerce (the Carmack amendment of 1906), the limitation of the liability is binding on the respondent. (*Adams Express Co. v. Croniger*, 226 U. S. 491; *C. B. & Q. Co. v. Miller*, 226 U. S. 513; *Chicago, St. Paul, M. & O. Ry. Co. v. Latta*, 226 U. S. 519.)

The Zetler case involved an interstate transaction, wholly within the purview of the Carmack amendment. The decisions of the United States Supreme Court are controlling in the case at bar.

James Donovan, for Respondent:

It is urged by appellant that respondent is bound by the sixth subdivision contained in the ticket which was offered in evidence by defendant. We submit that there is no force in this statement, for no such contract as is embodied in this ticket can bind the plaintiff under the law of the State of Nevada; such contract is unilateral, inequitable, against the public policy of the State of Nevada, and against the express statutory provisions. (Comp. Laws, 1013, 1017; Rev. Laws, 3553, 3559.)

"The contract contained in the ticket is binding and valid." This is only true under certain conditions, and the courts will not look with favor upon these contracts when they are not, in the strict sense of the law, contracts. Wherever a carrier of freight or passengers fixes a settled rate that the public can either accept or walk, courts in this day do not look upon these as contracts, in the strict sense of the term; it is not the meeting of the minds of the carrier and passenger and the agreement of a certain price, but it is an arbitrary contract, forced involuntarily upon the passenger which he must accept or he cannot ride. For this reason, carriers being quasi-public institutions, the legislatures of the different states,

Argument for Respondent

and Congress itself, have assumed a right to fix these rates within limitations; if it were a private contract, Congress could not do this, nor legislatures either, and it is only under certain exceptional conditions that contracts of this character will be held binding, especially in reference to the limitation of the liability of the railroad corporation. There must be an additional consideration given from the railroad company to the passenger outside of the regular fixed rate in order to limit the liability for baggage so as to bind the passenger. Courts no longer hold, where there is a uniform rate fixed which is general in its character, that these limitations are binding, but they only hold where there is an additional consideration going to the passenger from the railroad company that these limitations are binding. (*Hooker v. Boston and Maine R. R. Co.*, 209 Mass. 598, 95 N. E. 945.)

The settled law of this country at the present time, as we view it, is this: that where there is a fixed rate for the general public as passengers between certain points that the limitations are not binding; that they are binding only where the passenger travels upon a ticket that is sold for less than the regular rate, and by reason of selling the ticket to the passenger at a lesser rate, the passenger, in consideration of that lesser price, agrees to the limitation of the liability to a certain fixed amount. This is as far as the courts will go in support of the contention of the appellant in this case.

In Reply to Petition for Rehearing: The cases cited by appellant and upon which a rehearing is sought are wholly inapplicable to any points involved in the case at bar. There is a wide and conflicting difference between liability in the transportation of ordinary personal property by freight carriers or express carriers and the liability created by the carriage of baggage upon a passenger ticket.

In so far as we have been able to gather from the cases cited, the principle heretofore announced has not been varied by what the appellant terms the Carmack amendment to the interstate commerce act, neither do these

decisions in anywise interfere with the modified rule as we have declared, but they simply confirm what we say is the rule of law applicable to such cases.

By the Court, TALBOT, J.:

This is an appeal from a judgment in favor of the plaintiff for \$783.95 for damages for the loss of baggage and from an order denying defendant's motion for a new trial.

[1] The baggage was checked on a ticket which bore a number of written conditions, among which was the one: "It is agreed that the value of the baggage transported under this ticket shall not exceed one hundred dollars." Under the contentions made it may be conceded for the purposes of this case that "it is competent for passenger carriers by specific regulations which are reasonable and not inconsistent with any statute or its duties to the public, and which are distinctly brought to the knowledge of the passenger, to protect themselves against liability as insurers of baggage exceeding a fixed amount in value, except upon additional compensation proportioned to the risk." (Moore on Carriers, sec. 52.) Even if so, it has been held, where such is acknowledged to be the law by decision or even by statute, that the carrier is liable for the baggage lost through his negligence, notwithstanding a valid contract limiting the amount of the liability. (*Tewes v. North German Lloyd S. S. Co.*, 42 Misc. Rep. 148, 85 N. Y. Supp. 994; *Holmes v. North German Lloyd S. S. Co.*, 184 N. Y. 280, 77 N. E. 21, 5 L. R. A., N. S., 650; *Saleeby v. Central R. Co. of New Jersey*, 99 App. Div. 163, 90 N. Y. Supp. 1042; *Williams v. Central R. Co. of New Jersey*, 93 App. Div. 582, 88 N. Y. Supp. 434; *Saunders v. Southern Ry. Co.*, 128 Fed. 15, 62 C. C. A. 523; *Bank of Kentucky v. Adams Exp. Co.*, 93 U. S. 174, 23 L. Ed. 872; *New York Cent. R. R. Co. v. Lockwood*, 17 Wall. 357, 21 L. Ed. 627.)

[2] As it appears that the damage was occasioned by the delivery of the trunk by the plaintiff at the baggage

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room to some person not entitled to receive it, we think this was such negligence on the part of the company as to render it liable for the value of the articles lost, notwithstanding the contract.

Respondent moved to strike the statement from the files because not filed in time, but we think it was filed within the time properly allowed by extensions.

The judgment of the district court is affirmed.

SWEENEY, C. J.: I concur.

NORCROSS, J., dissenting:

I am unable to concur in the conclusions reached by my associates in this case. The main question involved is of first impression in this court and concerns an important rule of liability of common carriers.

The proofs in the case show that the plaintiff, Zetler, purchased a ticket from the Great Northern Railway Company at Bellingham, State of Washington, for transportation over it and other connecting lines, including that of the defendant, to Goldfield, Nevada. The ticket so purchased was a second-class ticket, which contained the following provisions subscribed to by the plaintiff: "Issued by the Great Northern Railway Line. Good for one passage to Goldfield, Nevada. * * * Subject to the following contract: 1st. In selling this ticket and checking baggage thereon, this company acts as agent and is not responsible beyond its own line. * * * 6th. It is agreed that the value of the baggage transported under this ticket shall not exceed \$100. 7th. This ticket must be signed below by the purchaser. * * * No agent or employee has power to modify this contract in any particular. I hereby agree to all the conditions of the above contract. [Signed] A. Zetler, purchaser. Witness: R. M. Smith, agent. A. L. Craig, Passenger Traffic Manager."

The baggage in question was checked the day following the purchase of the ticket and a duplicate check given to the plaintiff therefor, reading in part as follows:

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"Special Duplicate Check. Great Northern Railway, * * * via G. N. Ry. to Seattle, N. P. to Portland, Southern Pacific to ———. Tonopah & Goldfield per destiny, 14157, Form 160, Series J. Baggage consists of wearing apparel and personal effects of the passenger, which may be necessary for the journey. The liability of this company and all others over which the baggage passes is limited to \$100. All baggage valued in excess of this amount will be transported at proportionate rates."

The principal question involved in this case relates to the amount of damages the plaintiff is entitled to recover. The plaintiff alleged and recovered judgment for damages in the sum of \$783.95. There is no testimony upon the part of the plaintiff or proof in this case that the plaintiff did not have knowledge of the terms and conditions of the ticket purchased by him at the time of such purchase and at the time of checking his baggage. So far as the evidence goes, the ticket was offered in evidence by the defendant, the plaintiff acknowledged his signature thereto, and the matter of the ticket was allowed to rest. Presumptively, at least, one who subscribes to an instrument has knowledge of its contents, and, in the absence of evidence that will relieve him from the effect of his apparently voluntary act, he is bound by the provisions of the instrument, otherwise valid, which he has executed. If the ticket upon its face was in effect a valid contract binding upon the plaintiff, the burden was upon the plaintiff to show facts, if such existed, that would relieve him from its otherwise binding force. One of the conditions of the ticket to which plaintiff subscribed was "that the value of the baggage transported under this ticket shall not exceed \$100." Unless it can be said that this condition is unreasonable or contrary to some provision of statute, or against public policy, plaintiff is bound by it. It appears that the railroad company selling the ticket had made provision for the carrying of baggage of a higher value than that carried free upon the ticket which could be carried at the company's risk upon the payment

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of additional proportionate rates. This provision was printed upon the trunk check received by the plaintiff. Plaintiff in his testimony makes no contention that he was not aware at the time of the provision printed on his check, or that his attention was not called thereto.

Provisions included in railroad tickets, attempting arbitrarily to limit liability for loss of baggage beyond a certain prescribed amount, have been held by the courts to be invalid, as contrary to the rule of the common law. However, as succinctly stated by Moore on Carriers, sec. 52, the authorities very generally recognize that: "It is competent for passenger carriers by specific regulations which are reasonable and not inconsistent with any statute or its duties to the public, and which are distinctly brought to the knowledge of the passenger, to protect themselves against liability as insurers of baggage exceeding a fixed amount in value, except upon additional compensation proportioned to the risk."

Hutchinson on Carriers, vol. 3, sec. 1297, says: "In general, it may be stated that there is no distinction between the baggage of a passenger and ordinary goods in respect to the rights of the parties to enter into contracts limiting the liability of the carrier." And again, in section 1299; the author says: "Conditions intended to restrict the carrier's common-law liability in respect to the carriage of baggage are frequently written or printed upon passenger tickets, and the question arises as to the extent to which such conditions will be binding on the person accepting the ticket. If the ticket imports a special contract, the presumption will arise that the person accepting the ticket knew of and thereby assented to such of its lawful limitations as were plainly written or printed upon it as a part of the contract."

In the recent case of *Hooker v. Boston and Maine Railroad*, 209 Mass. 598, 95 N. E. 945, Ann. Cas. 1912B, 669, cited by respondent, the Supreme Court of Massachusetts, while holding the defendant company to full liability for the loss of baggage in question, because regulations limiting liability were not brought to the

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knowledge of the plaintiff or assented to, said: "The common-law rule fixing the rights of the parties is not open to doubt. It is that respecting the transportation of baggage or merchandise a common carrier may relieve itself from many of the heavy responsibilities amounting to insurance cast upon it by the law. It may not exonerate itself, however, by regulation or by contract from liability for its own negligence, but it may make just and reasonable stipulations in good faith as to the value of the property intrusted to its care, and the amount for which it shall respond in case of loss, even though occurring through its own negligence. Such stipulations must be brought home to the knowledge of the shipper through either a formal contract, or express or inferable notice, under circumstances warranting the assumption of actual assent"—citing many authorities.

In the leading case of *Railroad Company v. Fraloff*, 100 U. S. 24, 25 L. Ed. 531, the court by Harlan, J., says: "It is undoubtedly competent for carriers of passengers, by specific regulations, distinctly brought to the knowledge of the passenger which are reasonable in their character, and not inconsistent with any statute or their duties to the public, to protect themselves against liability, as insurers, for baggage exceeding a fixed amount in value, except upon additional compensation, proportioned to the risk." The distinction between cases where there has been an agreement between the carrier and the passenger or shipper as to value and where there has been an attempt to limit liability, regardless of value, is illustrated by the recent case of *Wells v. Great Northern Railway Company*, 59 Or. 165, 176, 116 Pac. 1070, 1071, 34 L. R. A. (N. S.) 825, wherein the court said: "The defendant also mistakes the effect of the seventh clause of the contract, limiting the liability of the company. It is not a stipulation of the value of the goods shipped, but limits the liability to \$100 in any case, and is not an agreed value of the goods shipped. 'The baggage liability is limited to wearing apparel only, not exceeding \$100 in value,' and the passenger does not participate

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in fixing the amount. He must accept the stipulation as given in the ticket, or leave his baggage. This is conceded in the second brief filed on this motion, where it is contended that the limitation is fixed by the schedule of rates filed by the company with the interstate commerce commission, and has the force and effect of a law. Without assenting to that statement, certainly there was no agreement as to the value of the goods shipped. Mr. Justice Wolverton, in *Normile v. Oregon Nav. Co.*, makes the distinction between an attempt by the carrier to stipulate against liabilities, regardless of the value, and a stipulation fixing the value of the freight to be carried; and counsel for defendant claim that this case comes within the latter class, but in this he is in error. It is said at page 184 of 41 Or., at page 930 of 69 Pac.: 'It is a sound and wholesome doctrine, based upon consideration of public policy and fair dealing, that a common carrier will not be permitted to stipulate against liability for the loss or injury of property intrusted to it for carriage and transportation, occasioned by its own negligence. * * * Nor can the carrier be permitted to stipulate or contract for partial or limited exemption from liability occasioned by its negligence with any more reason than it may for a total exemption.' And, on the other hand, he recognized that the shipper may agree with the company upon the value of the goods shipped, and be bound thereby, and 'if plaintiff freely and without restraint—that is, was laboring under no such inequality of conditions as that he was compelled to enter into the contract, whether he would or not, in order to have his stock carried—executed the contract in question, he is bound by the stipulations as to the value.' Here there is no stipulation as to value, but there is an attempt to limit the liability, regardless of value." In the case at bar, the evidence shows, without contradiction, that the plaintiff entered into what purports to constitute a mutual contract between himself and the carriers (6 Cyc. 570, 574; *Rose v. N. P. Ry. Co.*, 35 Mont. 70, 88 Pac. 769, 119 Am. St. Rep. 836; *Donlon v. Southern*

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Pacific Company, 151 Cal. 763, 91 Pac. 603, 11 L. R. A., N. S., 811, 12 Ann. Cas. 1118), wherein it was agreed that the value of his baggage to be transported under his ticket should not exceed \$100. It also appears from the evidence that upon the payment of an additional proportionate charge the carrier would have transported the baggage and assumed the risk up to the value claimed.

It cannot be said, I think, under the facts of this case, that the stipulation as to value was unreasonable. (*Tewes v. N. G. L. Steamship Co.*, 186 N. Y. 151, 78 N. E. 864, 8 L. R. A., N. S., 199, 9 Ann. Cas. 909; *Rose v. N. P. Ry. Co.*, *supra*; *The New England*, 110 Fed. 418; *The Priscilla*, 106 Fed. 739.)

Nothing in the sections of our statutes cited by counsel for respondent (Rev. Laws, 3553, 3558, 3559), I think, militates against a passenger or shipper contracting with a carrier and agreeing in advance as to the value of the baggage or other property shipped, so as to estop such passenger or shipper from asserting a higher value than that stated in his contract upon which the rate of transportation has been fixed, based upon such value. (*Rose v. Railway Co.*, *supra*; *Hart v. Pennsylvania R. R. Co.*, 112 U. S. 331, 5 Sup. Ct. 151, 28 L. Ed. 717.)

In the Hart case, *supra*, the Supreme Court of the United States said: "The limitation as to value has no tendency to exempt from liability for negligence. It does not induce want of care. It exacts from the carrier the measure of care due to the value agreed on. The carrier is bound to respond in that value for negligence. The compensation for carriage is based on that value. The shipper is estopped from saying that the value is greater. The articles have no greater value, for the purposes of the contract of transportation, between the parties to the contract. The carrier must respond for negligence up to that value. It is just and reasonable that such a contract, fairly entered into, and, where there is no deceit practiced on the shipper, should be upheld. There is no violation of public policy. On the

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contrary, it would be unjust and unreasonable, and would be repugnant to the soundest principles of fair dealing and of the freedom of contracting, and thus in conflict with public policy, if a shipper should be allowed to reap the benefit of the contract if there is no loss, and to repudiate it in case of loss."

It is the policy of both the federal and state governments to require common carriers to fix passenger and commodity charges, as far as possible, on a basis of service rendered. It is universally recognized that the value of any article transported is a proper matter to be considered in fixing the charge. Theoretically, and presumably practically, liability for loss or injury enters into the consideration in fixing a charge for the transportation of freight or baggage. If the carrier may not by mutual contract or regulation fix a reasonable limit upon the value of baggage which it will carry upon a ticket without additional charge, then the carrier is bound to assume a greater liability, which, presumably, would result in a greater charge. Doubtless, the great mass of passengers on railroads do not carry baggage of a value in excess of \$100, and such passengers ought not to be compelled to pay an additional charge to cover the liability which the carrier would have to assume in cases of passengers carrying baggage of a higher value. The fixing of a reasonable limit on the value of baggage to be carried free upon a ticket, providing the passenger is permitted to carry baggage of a higher value at the carrier's risk, upon paying an additional proportion to charge, violates no rule of public policy and is fair and just to all passengers.

For the reasons given, I think a new trial should be granted.

NOTE—At the time of printing this volume petition for rehearing the foregoing case is pending.

Points decided

[No. 1942]

**ROUND MOUNTAIN MINING COMPANY, ET AL.,
APPELLANTS, v. ROUND MOUNTAIN SPHINX
MINING COMPANY, ET AL., RESPONDENTS.****1. APPEAL AND ERROR—CONCLUSIVENESS OF FINDINGS—CONFLICTING EVIDENCE.**

Findings of the lower court upon conflicting evidence are binding upon the supreme court.

2. MINES AND MINERALS—RIGHT ACQUIRED—EXTRALATERAL RIGHTS—CROSS VEIN OR LODE.

Where a mining claim containing the apex of a cross lode, lying entirely within the surface boundary of a prior claim or group owned by the same party, is held invalid, the side lines of the prior claim constitute end lines in determining the extralateral rights on the cross vein, across which, as they extend vertically downward, the lode cannot be followed.

3. MINES AND MINERALS—ACTION TO DETERMINE RIGHTS—BURDEN OF PROOF.

Where the location certificate of a junior mining claim recited that the claim was wholly within the boundaries of another claim, such certificate was sufficiently ambiguous or conflicting to cast upon the subsequent locator the burden of showing that the prior claim was invalid.

4. MINES AND MINERALS—ACTION TO DETERMINE RIGHTS—ADMISSIBILITY OF EVIDENCE—LOCATION CERTIFICATE.

In determining priority of mining claims, the declarations contained in the record, by which the subsequent patent was obtained, were admissible in the absence of proof that the record did not state the truth.

5. MINES AND MINERALS—VALIDITY OF LOCATION WITHIN VALID EXISTING LOCATION.

The location of a mining claim, based upon a discovery of mineral within the limits of a valid existing claim, was void.

6. MINES AND MINERALS—PROCEEDINGS IN LAND OFFICE—CONCLUSIVENESS OF DECISION.

The issuance of a patent by the land department after adjudication by the proper tribunal is conclusive and not subject to collateral attack as to all matters before the tribunal for adjudication and as to all persons who were parties to such adjudication, and hence, where the owner of a mining claim did not file an adverse to a subsequent application for patent, the land department's patent to the applicant is conclusive as to the rights of the parties to the surface ground included in the application.

7. MINES AND MINERALS—LANDS OPEN TO LOCATION—UNOCCUPIED AND UNAPPROPRIATED MINERAL LANDS.

Land legally segregated from occupancy or appropriation may be conveyed by the United States government as a mining claim.

Points decided

8. MINES AND MINERALS—VALIDITY OF LOCATION—CLAIMS ALREADY CONVEYED.

Where a claim to land legally segregated from occupancy or appropriation is conveyed, the government has no further right to patent a claim located wholly within its boundaries, since it cannot convey the same tract of land twice.

9. MINES AND MINERALS—PROCEEDINGS IN LAND OFFICE—CONCLUSIVENESS.

In an equitable action to quiet title to a lode or vein which involves questions of extralateral rights not involved in the proceedings for patent, defendant, who filed no adverse thereto, is not estopped from questioning the validity of the location of the claim under which the plaintiff seeks to enforce such extralateral rights as against him.

10. MINES AND MINERALS—EQUITABLE ACTION TO ESTABLISH RIGHTS—DEFENSES.

In an equitable action to determine rights to mining claims, the invalidity of plaintiff's patent may be pleaded as a defense and tried upon the same principles as an original bill in equity.

11. MINES AND MINERALS—PROCEEDINGS IN LAND OFFICE—JURISDICTION TO DETERMINE PRIORITY.

The land department has jurisdiction to determine questions of priority as between conflicting lode locations embraced in the same group application.

12. EVIDENCE — DECLARATIONS — SELF-SERVING DECLARATIONS BY AGENT.

In an equitable action to quiet title to a mining claim, field notes made by plaintiff's surveyors, containing an exclusion of conflict area from one claim in favor of another, were properly excluded as self-serving acts by an agent of the plaintiff which could not be binding on the defendant.

13. MINES AND MINERALS—ACTION TO ESTABLISH RIGHTS—JURISDICTION OF DISTRICT COURT—DETERMINATION OF PRIORITY.

In an equitable action to quiet title to a lode or vein, where the land department did not determine the question of priority of claims in the same group, but made a double grant of the conflicting area, appearing upon the face of the later patent, the district court had jurisdiction to determine such priority.

APPEAL from the Seventh Judicial District Court, Esmeralda County; *Theron Stevens*, Judge.

Action by the Round Mountain Mining Company and others against the Round Mountain Sphinx Mining Company and others. Judgment for defendants, and plaintiffs appeal. **Affirmed.** [Petition for rehearing pending.]

The facts sufficiently appear in the opinion.

Argument for Appellants

R. G. Withers, and Dickson, Ellis, Ellis & Schulder, for Appellants:

A certificate of location, or notice of location, in and of itself, is no evidence whatever of the fact of discovery. Any statement that might be found therein as to date of discovery, or any mention therein contained of a discovery, is but the *ex parte* statement of the party writing it. (*Smith v. Newell*, 86 Fed. 56; *Flick v. Gold Hill & L. M. Co.*, 8 Mont. 298; *Fox v. Myers*, 29 Nev. 169; *Erhardt v. Boaro*, 113 U. S. 527; *Lindley on Mines*, sec. 392.)

The location of the Los Gazabo does not purport to be a relocation of the Sunnysides, or of any part of either of them. The statement found in the notice that it is wholly within ground claimed by the Sunnysides falls far short of an admission that either of the Sunnysides was, at the time of the location of the Los Gazabo, a valid location. On the contrary, there is in this language an implied assertion of the invalidity of the Sunnyside claims.

It is difficult to understand how the court reached the conclusion that the statement as to the date of the Sunnyside location contained in the application for patent was to be taken as conclusive or even competent evidence that a discovery was in fact made on the 20th of February, 1906. As we have already pointed out, Gordon was not on the premises until the 10th of March; nor was Davis on the ground prior to the 14th of March.

Discovery of a vein or lode of rock in place is, of course, an indispensable prerequisite to a valid location. Full compliance with all the requirements of the law, local, state and national, with respect to the marking of boundaries, the posting and recording of a notice of location, and prosecution of work, will, in the absence of discovery, be ineffectual to segregate the ground embraced within the attempted location from the public domain. Until the discovery of a vein or lode thereon, the territory is still open to the examination and exploration of any qualified locator who may enter thereon peaceably. And if one so enters and is the first to discover a vein or

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lode therein, he may lawfully make a location based upon this discovery. If he does so, such location as to the ground covered thereby becomes, under the law, the first and only valid claim. (1 Lindley on Mines, sec. 335; *Miller v. Chrisman*, 140 Cal. 440; *Erhardt v. Boaro*, 113 U. S. 527; *King v. Amy and Silversmith Con. M. Co.*, 152 U. S. 222; *Creed v. Uintah T. M. & T. Co.*, 196 U. S. 337; *Hanson v. Craig*, 170 Fed. 62.)

If we are correct in our contention that there is no evidence to justify this conclusion of the court, it follows that the decree must be reversed; for it would be at once apparent that it was rendered upon an erroneous assumption respecting an all-important fact in the case. It would be impossible for this court to say that the judgment or decree would have been the same if the lower court had not fallen into error respecting this question of fact. On the contrary, in the light of the evidence, it must be apparent that but for such error the learned judge would have been impelled to the conclusion that Stebbins, who attempted the location of the Sunnysides Nos. 1, 2, and 3 on the 20th of February, had not, prior to the location of the Gazabo on the 3d of March, made any discovery of a vein or lode within the limits of either of the Sunnysides; that neither of them was a valid location on the date last named, and the decree would have been in favor of plaintiff in accordance with the prayer of its complaint. But if there were any evidence to support the finding of the learned judge that the locations by Stebbins of the Sunnysides Nos. 1, 2, and 3 were respectively based upon a discovery made on the Gazabo vein, still neither of these attempted locations would have been a valid and subsisting mining claim when the Gazabo location was made, for the reason that neither the location monument, nor notice of location of either claim, was placed on a lode or vein at the point of discovery, as required by the statutes of Nevada, but was placed hundreds of feet away from any part of the top or apex of that vein. (Comp. Laws, 208; Lindley on Mines, sec. 329, p. 595; *Butte Northern Copper Company v. Radmilovich*, 101 Pac. 1078; *Cheeseman v. Shreeve*, 40

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Fed. 787; *Copper Globe M. Co. v. Allman*, 23 Utah, 410, 64 Pac. 1019; *Fox v. Myers*, 29 Nev. 169.)

A patent from the government for a mining claim or other lands, pursuant to the decision of the land department, in a matter over which it had jurisdiction, passes the legal title notwithstanding the determination of the department may have been based upon a mistaken view of the law or of the evidence submitted. The validity of the patent cannot be called in question collaterally. It is conclusive evidence of the title in all actions at law. It cannot be adjudged void, even in a direct attack in a court of equity; and it matters not whether there was or was not any contest before the department. (*Smelting Company v. Kemp*, 104 U. S. 636; *Steel v. Smelting Co.*, 106 U. S. 447; *Quinby v. Conlan*, 104 U. S. 420; *French v. Fyan*, 93 U. S. 169; *Johnson v. Townsby*, 13 Wall. 72; *Shipley v. Cowan*, 91 U. S. 330; *United States v. Winona and St. Paul Ry. Co.*, 67 Fed. 948; *Johnson v. Drew*, 171 U. S. 93, 99; *Doe v. Waterloo M. Co.*, 54 Fed. 935; *King v. McAndrews*, 111 Fed. 860; *Carson City Gold and Silver M. Co. v. North Star M. Co.*, 83 Fed. 658; *Gail v. Best*, 78 Cal. 235; *Talbot v. King*, 9 Pac. 439; *Peabody G. M. Co. v. Gold Hill M. Co.*, 111 Fed. 817; *Courchaise v. Bullion M. Co.*, 4 Nev. 375; *Jeffers v. Hine*, 2 Ariz. 162; *Iron Silver M. Co. v. Campbell*, 29 Pac. 513; *Justice M. Co. v. Lee*, 40 Pac. 444; *Butte City v. Smoke House*, 12 Pac. 864; *Chambers v. Jones*, 42 Pac. 758; *Park v. Carroll*, 76 Fed. 474; *United States v. Iron Silver M. Co.*, 128 U. S. 673; *Montana Central Railroad Co. v. Migeon*, 68 Fed. 811; *Galbraith v. Shasta Iron Co.*, 143 Cal. 94; *Calhoun Gold M. Co. v. Ajax Gold M. Co.*, 182 U. S. 499; *Creed v. Uintah T. M. & T. Co.*, 196 U. S. 337; 2 Lindley on Mines, sec. 777.)

Did, then, the land department have jurisdiction to act upon the plaintiff's application for a patent for the Gazabo and Sunnyside claims? That it had would seem to be too clear to leave any ground for reasonable controversy. Unquestionably the territory in conflict between these claims was subject to sale and disposition by the

government acting through the department; otherwise a patent therefor could never issue. When the application for a patent to this conflict area was made, not only did the department have authority to act thereon, but it was charged under the law with the plain duty to act and to determine which of the conflicting claims was entitled to a patent therefor. If, in the discharge of this duty, it erred in awarding a patent to the Gazabo, which should have been awarded to the Sunnysides, it cannot be said that it acted without jurisdiction. The most that could be claimed would be that in passing upon a matter clearly within its jurisdiction it rendered an erroneous decision. (*Foltz v. St. Louis and St. Paul Ry. Co.*, 60 Fed. 316; *King v. McAndrews*, 111 Fed. 860; *United States v. Winona and St. Paul Railway Co.*, 67 Fed. 948; *United States v. Schurz*, 102 U. S. 378; *New Dunderberg M. Co. v. Old*, 79 Fed. 598; *United States v. Northern Pacific Railroad Co.*, 95 Fed. 864; *James v. Germania Iron Co.*, 107 Fed. 597; *Bingham Amalgamated C. Co. v. Ute Copper Co.*, 181 Fed. 748-9.)

One who would attack a patent for a mistake of fact in the decision of the questions which condition its issue must distinctly plead and clearly prove the evidence before the land department from which the mistake resulted, the particular mistake that was made, the way in which it occurred, and the fact that if it had not been made the decision would have been otherwise, and the patent would not have issued, before any court can enter upon the consideration of any issue of fact determined by the department. (*United States v. Northern Pacific Railroad Co.*, 95 Fed. 864; *James v. Germania Iron Co.*, 107 Fed. 597; *Hooper v. Young*, 140 Cal. 274; *Durango Land and Coal Co. v. Evans*, 80 Fed. 425.)

It is, of course, impossible that any court can say that the land department was misled as to the facts, or that in its decision it erred in the interpretation of the law applicable to the facts before it and upon which it was required to pass judgment, without knowing what the evidence and all the evidence before the department was. The trial court, having reached the conclusion that the

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location of the Los Gazabo was void, determined, as a corollary, that the patent issued thereon, after regular proceedings had in the land office in strict conformity with the requirements of the act of Congress (Rev. St. U. S. 2325), was itself void. In none of the cases cited by the learned judge was any such question as this involved. We think we may safely say that no case can be found to support this decision, while the Colorado case of *Seymour v. Fisher*, 27 Pac. 240, is expressly opposed to it. See, also, *Bingham Amalgamated C. Co. v. Ute Copper Co.*, 181 Fed. 748.

The defendant, Round Mountain Sphinx Company, as owner of the so-called Gold Leaf mining claim, not having filed an adverse claim to plaintiff's application for patent, is now precluded from questioning its validity. (*Wight v. Dubois*, 21 Fed. 693; *Kannaugh v. Quartette M. Co.*, 27 Pac. 245; *Golden Reward M. Co. v. Buxton M. Co.*, 79 Fed. 868; *Mining Co. v. Bullion M. Co.*, 3 Sawy. 634, 659; *Deno v. Griffin*, 20 Nev. 249; *Steel v. Gold Lead M. Co.*, 18 Nev. 87; *Nesbitt v. Delamar*, 24 Nev. 287; *Richmond Co. v. Ross*, 114 U. S. 576; *Creed v. Uintah T. M. & T. Co.*, 196 U. S. 337; *Talbot v. King*, 5 Mont. 434.)

But the learned judge before whom the case was tried says in his opinion, in effect, that the question of priority of location as between the Los Gazabo and the several Sunnysides was not before the land department. This is clearly error. The question of the validity of the Los Gazabo was directly and necessarily involved in the proceedings in the land office. The decision of the department, by virtue of which the patent was issued, could not have been rendered unless the department had found in favor of the validity of the Los Gazabo, for the patent embraces territory which was claimed, and could only be claimed, by the applicant by virtue of its ownership of the Gazabo.

Moreover, the notices of location of the Sunnysides Nos. 1, 2, and 3, presented to the land office in connection with the application for patent, bore date of February 20, 1906, while the Los Gazabo notice of location bore date of March 3 following. The field notes and the plat required

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by law to be filed with the application must have shown at a glance that the Gazabo claim, except as to the small triangular piece of ground in the northwest corner thereof, was wholly within these Sunnyside claims. Thus, on the face of the application for a patent to the Los Gazabo, the attention of the officials of the department was directly called to the fact that the area in conflict between that claim and the Sunnysides would belong to the latter claim, if a valid location of these claims had been made on the 20th of February, or at any time prior to the location of the Gazabo. Before it could be determined which of the claims was entitled to a patent for this conflict area, the department had to ascertain whether or not there had been a valid location of the Sunnysides on or before the 3d of March, or whether the Los Gazabo was the first valid location which covered the conflict. It was the duty of the officers of that department under the law to investigate and pass upon this very matter. It is to be presumed that they discharged this duty. And, as we have said, the department, upon such investigation, must have determined that the discovery made by the locators of the Los Gazabo, and upon which that location was based, was upon vacant public mineral domain; in other words, that the discovery of the Los Gazabo antedated the discoveries upon which the Sunnyside locations were respectively based. This involved the determination of a question of fact, or a mixed question of law and fact. The decision of the department, in a matter over which it has jurisdiction, is as to all questions of fact determined by it, in the absence of fraud, unassailable either in a court of law or a court of equity. Its decision upon a question of mixed law and fact is likewise unassailable, unless it is made to appear clearly wherein, if at all, the department fell into any error of law in reaching its conclusion. (*Marquez v. Frisbie*, 101 U. S. 473; *Bates & Gill Co. v. Paine*, 194 U. S. 106.)

How is it possible for the court to say, in the absence of what the evidence before the department was, that it fell into any error, either of law or fact, in awarding the

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patent in question to the Los Gazabo claim? We submit if the evidence before the department, as to whether or not the location of the Gazabo was the first valid location made upon the Gazabo vein, was the same as was introduced on the trial of this cause, the only correct conclusion which could have been drawn therefrom was that which it is evident the department reached in passing upon this application for patent.

The assumption or contention that there is a double grant of this conflict area, or that in the grant there is found any uncertainty or ambiguity as to which of the conflicting locations was awarded, or took title thereto, under the grant, is one that finds no warrant in the record. What are the facts as disclosed by the record? Was there a double grant of this conflict area? Let us look first to the patent alone. From it we find (taking the descriptions of the several claims as found therein) that the total area of the Sunnyside No. 1 is 19.415 acres; that the total area of the Sunnyside No. 2 is 16.274 acres; that the total area of the Sunnyside No. 3 is 18.839 acres; that the total area of the Sunnyside Fraction is 2.644 acres; that the total area of the Los Gazabo is 16.484 acres, or a total of 73.656 acres; but it appears upon the face of the patent that there was excluded from the Sunnyside No. 3 a small triangle, the area of which was .083 acres, leaving 73.573 acres, but, by the patent, 57.137 acres only were conveyed. Taking again the descriptions contained in the patent, we find that the area in conflict between the Gazabo and the Sunnyside No. 1 was 6.481 acres; between the Gazabo and Sunnyside No. 2 was 6.571 acres; between the Gazabo and Sunnyside No. 3, 2.317 acres, and between the Gazabo and Sunnyside Fraction, 1.067 acres, or a total area of 16.436 acres. Now, 73.573 less 16.436 equals 57.137, or the exact acreage conveyed by the patent. Thus it clearly appears upon the face of the patent itself that there was but a single grant of the conflict area, and, so far at least as the Sphinx Company is concerned, all uncertainty as to which of the conflicting locations took

title thereto, should be set at rest by the admission in its answer that a patent had been obtained for the Los Gazabo.

It is only necessary to look to the patent, and to read and construe it in the light of the act of Congress and the regulations of the land department in force at the time it was issued, to discover that the department must have determined the Los Gazabo location was a valid one, and that to that claim the legal title to the conflict area was by the patent conveyed. (U. S. Rev. Stats. 2325; 2 Lindley on Mines, secs. 671, 1243-1245.)

The regulations of the land department provide (par. 34) that four plats and one copy of the original field notes in each case shall be prepared by the surveyor-general, and one plat and a copy of the field notes is to be given to the claimant for filing with the proper register, to be finally transmitted by that officer, with other papers in the case, to the general land office at Washington. (2 Lindley, pp. 1697, 1698.)

Now, the commissioner whose duty it was in the first instance to pass upon the application and to determine whether a patent should issue thereon, and if so whether it should be for the whole or a part only of the premises embraced in the application, had but to read these field notes, or to casually inspect the plat, to discover what the true relative situation, with respect to each other, of the five claims mentioned in the application was. It was his duty to examine these documents and it must be presumed that he did so.

It has been so long established that an attempted location of a mining claim, based solely upon a discovery within the limits of a prior valid and subsisting claim, is wholly void that no one would now venture to question it. Surely it is not to be presumed that the officials of the land department, charged with the supervision of the applications for patent to mining claims, were ignorant or unmindful of this elementary proposition, especially in view of the fact that it has been recognized in the department by repeated rulings and decisions, beginning

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as early at least as the case of *Branagan v. DuLaney*, 2 L. D. 744, and cited in 2 Lindley, sec. 337.

"The validity of the Los Gazabo claim was not before the department." This is a manifest error on the part of the learned judge who pronounced the decision. In passing upon the application for this group of claims, the clear duty was imposed upon the department to determine the validity of each location. (*Steele v. Taylor*, 3 A. K. Marshall, 225, 13 Am. Dec. 151; *Faust v. Johnstone*, 110 Pac. 294; *Cragen v. Powell*, 128 U. S. 691; *Brown v. Hunger*, 21 How. 305; *Seward v. MaLotte*, 15 Cal. 304; *Hunt v. Rawley*, 87 Ill. 491; *Turner v. Union Pacific Ry. Co.*, 112 Mo. 542; *Lunt v. Holland*, 14 Mass. 149; *Lyon v. Fairbank*, 79 Wis. 455, 24 Am. St. Rep. 732; *Alexander v. Lively*, 5 B. T. Monroe, 159, 17 Am. Dec. 50; *Chesapeake B. R. Co. v. Washington T. & C. R. Co.*, 199 U. S. 247; *Kellogg v. Finn*, 119 N. W. 545; *Coombs v. Virginia Iron C. & C. Co.*, 106 S. W. 315, and cases there cited.)

In the case at bar the field notes of the survey were offered in evidence, objected to by defendants, and the objection sustained. Error is assigned upon this ruling of the court. The field notes are incorporated in the record for identification. They are before this court, and if it be found that the court below erred in excluding them, they should, we submit, be considered by this court and given the same effect as though the objection to the offer had been overruled.

If there were any uncertainty or ambiguity on the face of the patent itself as to which of the conflicting claims was awarded title to the conflicting area, it is removed and the question settled by these field notes. They show beyond doubt that the area in conflict was excluded from the Sunnysides and credited to the Los Gazabo.

The claim or pretension on the part of counsel for respondents that appellant could ever in any action assert or claim extralateral rights upon this segment of the vein, by virtue of its ownership of the Sunnysides, is wholly groundless, and is based upon a manifest misconception upon their part of the facts in the case, as disclosed by this record. •

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On Petition for Rehearing: Under the act of Congress and the rules and regulations of the land department the field notes are as much a part of the patent itself as though they had been written out at length therein. See Instructions of Commissioner of the General Land Office, in force at the time the field notes were returned to the office of the surveyor-general (July, 1906). These will be found in the manual of instructions, dated July 6, 1897, and addressed by the then commissioner to the "Surveyors-General and United States Deputy Mineral Surveyors" (pars. 4, 32, 33, 35). The specimen field notes referred to will be found at pages 29-43, and the plat at the close, of the manual. (U. S. Rev. Stats. 2325; *Waskey v. Hammer*, 223 U. S. 85.) The fact is indisputable that, under the rules and regulations in force at the time the survey under discussion was made, it was the plain duty of the surveyor to make the exclusion found in his field notes, and if he failed to do so, his survey would not have been accepted by the department.

We respectfully submit that, there being nothing found in these field notes not strictly in line with the official duty of the deputy mineral surveyor, it was error to exclude them. They were the notes of the survey upon which the application for patent was based. They were in literal compliance with the regulations in force. They show beyond doubt that the area in conflict was excluded from the Sunnysides and accredited to the Los Gazabo. They at once removed any uncertainty or ambiguity existing in the patent itself as to which of the conflicting claims was awarded title to this conflict area. The courts take judicial notice of these rules and regulations of the land department. (*Cana v. U. S.*, 152 U. S. 221; *U. S. v. Flournay Livestock Co.*, 71 Fed. 576; *Wilkins v. U. S.*, 96 Fed. 837; *Smith v. City of Shacklepoe*, 103 Fed. 240; *King v. McAndrews*, 104 Fed. 430; *U. S. v. Slater*, 123 Fed. 115; *Larsen v. First National Bank*, 92 N. W. 729; *Parsons v. Vengke*, 61 N. W. 1036.) And a lawful rule or regulation has the force of law. (*Wilkins v. U. S.*, 96 Fed. 837; *Grady v. U. S.*, 98 Fed. 238; *Files v. Davis*, 118 Fed. 465.)

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What is there upon which to base the statement that there was no exclusion in the verified application or in the publication of notice, or in the final application to purchase? Neither of these documents is found in the record. Neither of them was offered in evidence. They are not before the court. What exclusion of the conflict area is or is not found and contained in either of these documents cannot be ascertained or determined from anything found in the record.

How can it be said that the department failed to exercise such jurisdiction? We have neither allegation, nor proof in the record, as to what facts were before the department, or what the evidence was upon which it acted in directing the issuance of the patent.

Not only is it admitted that a patent for the Gazabo has been obtained, but it is apparent upon the face of the patent itself that it conveys territory outside of the Sunnysides, and which was covered by the Los Gazabo location only.

Clearly it was the duty of the department to pass upon the validity of the Los Gazabo location. That it did so, and that its determination was in favor of its validity, must be presumed, for, in the absence of such determination, the department would not have been justified in directing a patent which conveyed territory covered by no location except the Gazabo; and, a patent having been issued for that claim, it must be presumed that the location of the claim was based upon a valid discovery, and that the department so found. (*Work M. & M. Co. v. Dr. Jack Pot M. Co.*, 194 Fed. 620.)

A certificate of location, or notice of location, in and of itself is no evidence whatever of the fact of discovery. Any statement that might be found therein as to date of discovery, or any matters therein contained of a discovery, is but the *prima facie* statement of the one writing it. (*Smith v. Newell*, 86 Fed. 56; *Flick v. Gold Hill & L. M. Co.*, 8 Mont. 298; *Fox v. Meyers*, 29 Nev. 169; *Erhardt v. Boaro*, 113 U. S. 527; 1 Lindley on Mines, sec. 392.)

Argument for Respondents

Curtis H. Lindley, Detch & Carney, Wm. E. Colby, Grant H. Smith, and McIntosh & Cooke, for Respondents:

The Sunnyside-Los Gazabo patent is ambiguous, and the trial court had to determine the question of priority in order to clear up the question of ambiguity. The patent purports, as far as its description is concerned, to convey this conflict area twice, for it is twice described. Ordinarily this situation would give rise to no difficulty, for the patent conveys all the surface territory embraced within the outside perimeter bounding the Los Gazabo-Sunnyside group as a whole. However, by reason of the provisions of U. S. Rev. Stats. 2322, containing the grant of extralateral rights for lode claims, in addition to the facts of ownership of the mere surface, it becomes essential at times to ascertain just when the right to the surface attached, in order to determine the priorities as between conflicting extralateral rights flowing from distinct surface ownerships.

That the government cannot convey the same tract of land twice, and, once having made a conveyance of a piece of land, cannot again grant the same land, is elementary. (*Wright v. Roseberry*, 121 U. S. 488; *Davis's Administrator v. Weibold*, 139 U. S. 507.)

The same situation would exist if the patents describing the common tract were issued to one and the same patentee, instead of to different patentees. The second attempted grant on the part of the government would be impotent and would convey no title as far as the tract previously granted is concerned, and that portion of the attempted grant would be void. (*Golden Terra M. Co. v. Mahler*, 4 Morr. Min. Rep. 390.)

The fact that the two overlapping tracts of land are described in the same patent would not alter the rule, except that in the case of two separate patents a portion of the attempted grant by the second patent would be void and the area of the land actually conveyed by it would be diminished by the area of the conflict previously conveyed.

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It is clearly established when adverse rights are affected the question of priority of title can be inquired into *aliunde*, and the facts on which the diverse titles are based investigated when they do not appear on the face of the patents themselves. The doctrine of relation is invoked to determine which is the oldest and superior right. (13 Cyc. 627-628, 740, 745; *U. S. M. Co. v. Lawson*, 207 U. S. 1, 17; *Smith v. Athern*, 34 Cal. 506; *Yates v. Smith*, 38 Cal. 60; *Pappe v. Athern*, 42 Cal. 606; *Iron Silver M. Co. v. Campbell*, 135 U. S. 286; *Smelting Co. v. Kemp*, 104 U. S. 636.)

Taking the patent by itself, it is impossible to ascertain whether or not the Los Gazabo claim is entitled to the conflict area. If not entitled to the conflict area, the Los Gazabo claim has no free apex of the Sunnyside-Los Gazabo vein and hence no extralateral rights. (U. S. Rev. Stats. 2322; *St. Louis M. Co. v. Montana Co.*, 194 U. S. 235, 238; *U. S. M. Co. v. Lawson*, 207 U. S. 1, 8.)

This question of priority becomes all-important, and the only way in which it can be determined is by opening up and investigating all the essential antecedent history of the claims, as was done at the trial. The land department did not determine the question of Sunnyside-Los Gazabo priorities.

Appellant made no exclusion in favor of the Los Gazabo, either in its verified application for patent, or in its published notice, or in its final application to purchase. With the apparent design of getting such a patent as would enable it to claim an extralateral right in favor of the Los Gazabo or of the Sunnysides, or of both, as occasion demanded—all based on the same segment of vein—it applied for and received a patent to these conflicting claims which made no mention of the conflict.

The only attempt at exclusion is contained in the field notes furnished by the plaintiff's surveyors. This was a self-serving act by one of plaintiff's agents, and the land department purposely refused to determine this question of priorities in the face of the sworn positive statement

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contained in the application for patent, which furnished the basis for the whole prior to the Los Gazabo.

The land department not having determined this question of priority, and the ambiguity existing by reason of the double grant of the conflict area appearing on the face of the patent itself, it was eminently proper for the trial court to allow the whole question of priority to be opened up and determined as we have already indicated.

The Gold Leaf was not called on to adverse the Sunnysides-Gazabo patent application, and its failure to adverse does not preclude it from contesting extralateral rights. (*U. S. M. Co. v. Lawson*, 207 U. S. 1, 19.)

It is to be noted that the land department no longer permits a deputy surveyor to make any exclusions of acreage, but requires him to give the total area of each claim and the area of each conflict. Any exclusions of conflict areas must be made by the applicant for patent. The department has thus expressly disapproved of allowing a deputy surveyor to act in relation to matters which are beyond his jurisdiction. That the land department paid no attention to this portion of the surveyor's report and considered it immaterial, is conclusively established by the fact that the patent, which is the department's final adjudication of the patent application proceedings, makes no exclusions whatsoever.

The Los Gazabo location was void because included within the prior valid subsisting Sunnyside locations. It is elementary that if the Sunnyside locations were valid, the Los Gazabo was embraced almost entirely within these other locations. The Los Gazabo location monument, discovery point, and discovery shaft were all on ground already appropriated by the Sunnysides. (*Belk v. Meagher*, 104 U. S. 279; *Farrell v. Lockhart*, 210 U. S. 142; *Gwillim v. Donnellan*, 115 U. S. 45.)

In Reply to Petition for Rehearing: The general rule announced by appellant and supported by the authorities cited is undoubtedly correct—that when field notes are referred to in an instrument of conveyance they become a part of the description of the patent.

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The surveyor's function is to run lines, establish corners and boundaries, and compute areas, but there his function ceases. These matters are properly within his sphere of duty. But he cannot constitute himself a tribunal and assume judicial functions and determine questions which are clearly outside of his line of duty and which he is not authorized to do. Whenever he does this his survey and report on such points are to be ignored. (Story, J., in *Ellicott v. Pearl*, 10 Pet. 412; *Jackson v. Witter*, 2 Johns. 180; *Salmon v. Rance*, 3 S. & R. 311; *Eberle v. Board*, 11 Mo. 247; *Kenyon v. Nichols*, 1 R. I. 411; *Bodley v. Hernden*, 10 Ky. 22; 8 Copp's Land Owner, 104.)

The instructions to surveyors in force at the time this survey was made and the mining regulations of the land department (par. 38) both clearly indicate that the surveyor should leave the determination of questions of exclusions to the applicant, whose duty it is to state in his application for patent "the portions to be excluded in express terms."

Appellant's counsel contends that this may have been done for all that appears in the record. The answer to this is that the patent, the final adjudication of the matter by the land department, contains no such exclusion. This fact gives rise to the conclusive presumption that no such exclusion was contained in either the patent application or notices.

The field notes themselves contain a statement of the surveyor that the Sunnysides were located February 20, 1906, and the Los Gazabo on March 3, 1906. The field notes were not admissible for the purpose for which they were offered and if admitted they would have established the priority of the Sunnysides over the Los Gazabo.

Appellant cites certain provisions of the "Manual of Instructions," issued by the department of the interior to surveyors, regarding conflict areas, and would give the *ex parte* statements of the surveyors regarding such matters controlling and conclusive effect, even though such *ex parte* statements, which must of necessity be based on

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hearsay or self-serving evidence, are opposed to the actual facts of the case. We do not feel that the department intended anything more than to direct the surveyor to report such matters to the best of his information, and that the department would give such report the weight it was entitled to in view of all the facts. For such a report of the surveyor, made after a hasty examination in the field and based upon incomplete evidence, to have the effect of a conclusive and incontrovertible finding on such a matter would be contrary to all ideas of correctly ascertaining truth and fact. It would mean to give greater weight to inexact and necessarily incomplete methods of ascertaining the truth and make them prevail over the methods provided by judicial forums. If a surveyor's report on facts not within his knowledge can be given the effect contended for by respondent, it would mean that a surveyor could do what Judge Story has declared is not the law, *i. e.*, he could make "evidence as between third parties." That "a ministerial officer should usurp the province of the courts and determine questions whose sole cognizance belongs to them" was never intended by Congress.

We cannot come to any other logical conclusion than that such statements by a surveyor contained in his field notes are intended as merely advisory to the land department in the performance of its functions, and bind no one. Those statements are to be given merely the weight that they logically deserve, as *ex parte* statements solely, made without adequate data on which to base a just and final determination, and are made usually on the self-serving statements of the claimant of the property.

The case before this court is a clear illustration of the injustice which would result were the rule contended for by appellant the correct one. Here are the Sunnyside locations, demonstrated by the evidence to be prior to the Los Gazabo in point of time, and repeatedly in sworn declarations of appellant so declared to be prior, and yet in the face of this established fact appellant asks this court to brush all this positive evidence aside and accept

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the *ex parte* statement of the surveyor to the contrary, made solely because he was told to make it by appellant's attorney.

However, assuming for purposes of argument that appellant's contention is correct and that the Sunnysides-Los Gazabo field notes were properly admissible in evidence, they fail to establish appellant's contention. The surveyor himself in those same field notes makes the positive statement that the Sunnyside claims were located February 20, 1906, and the Los Gazabo claim on March 3 of the same year.

As a matter of fact the surveyor does not positively state that the conflict area is to be excluded from the Sunnysides in favor of the Los Gazabo, but merely gives certain calculations and net areas, from which it might be inferred that he intended that such a conclusion should follow.

Any statements made by the surveyor in the field notes were not binding on the land department and, at most, such statements would be regarded by the department as merely suggestive and to be considered in the light of all the other surrounding circumstances.

The very fact that the department did not adjudicate this question of priority and incorporate such adjudication in the patent which is, in a measure, its final judgment, being the culmination of the patent proceedings, is one of the most convincing and powerful arguments that the land department refused to accept such *ex parte* statements of the surveyor as to priority, because of the direct and positive evidence to the contrary contained in those same field notes.

Any requirement in any of its regulations regarding conflict areas was placed there for the purpose of securing information for its own use in passing on the patent application, and to contend that the department is bound by such *ex parte* and necessarily incomplete evidence furnished in such cases by surveyors is to strain all our concepts of logic and reason. Here the department saw fit to ignore the manifestly misleading calculations of the surveyor which might be taken to indicate priority, and

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omitted any adjudication of the matter from its patent. In its second point appellant declares that the court erred in considering the fact that appellant made no exclusion of the conflict area in either its verified application for patent, the published notice, or in its final application to purchase.

If such evidence was in existence it was incumbent on plaintiff to produce it to explain away the ambiguity. Not having produced it, the presumption would be that such favorable evidence did not exist, and that the formal application for patent, etc., did not contain such exclusion, or it would have been produced. (Wigmore on Evidence, sec. 284.)

Appellant, by juggling with the areas of the individual claims and with the total area, and by calculation based on courses and distances contained in the patent, claims that the net areas of the Sunnysides, after excluding the Los Gazabo conflict, can be determined from the patent itself. The complete answer to all this is that by similar calculation, and for that matter a much simpler process, exactly the opposite result can be obtained.

The statement is made in the answer that patents to groups of mining claims now issued by the land department do not contain specific exclusions of conflict areas occurring between claims embraced in the same group patent. How does this alter the rule that we are discussing? It only means that the land department leaves the adjudication of priorities for the courts to determine in each instance whenever the question assumes importance. This question would only become important for the courts to determine, however, when the same claimant has covered the same segment of apex with two conflicting locations, and has endeavored to shift priorities to the disadvantage of adjoining owners, as in this case.

Appellant says nothing about the positive statement of the surveyor in these same field notes that the Sunnyside locations were prior in point of time to the Los Gazabo. Appellant would have this court adopt only those portions of the surveyor's notes which are favorable to its case, and reject those that support the real facts.

McIntosh & Cooke, for Respondents, in reply to the petition for rehearing:

The regulations in force since 1897 and at the time the survey of the Sunnyside group was made read as follows: "The applicant for patent should state the portions to be excluded in express terms."

Appellant, by failing to produce or offer its application for patent, has admitted that no such exclusion was made therein. The unmistakable purpose in the clause is to give notice to parties affected, and we submit that a surface conflict is not the only method whereby a party may be affected. Hence, the reason of the rule requiring application for patent to state exclusion in express terms is just as applicable, just as necessary to a cause such as the one at bar, where no surface conflict exists. Whether the thing that takes away or destroys our property is by surface conflict or by extralateral projection is of no importance; the reason for giving the notice of the proceeding leading to such result is as apparent and as compelling in the one case as in the other.

Again, if the surveyor may make exclusion by a secret order from applicant by the mere statement in his field notes in case of conflict among claims in a group survey, why should not the same proceeding apply to exclusion of hostile surface conflict? Why give the hostile surface conflict claimant notice and no notice to hostile underground conflict claimant? When it is remembered that a vein with its underground ramifications is the principal subject of a mineral grant, and the surface a mere incident in practical effect, it must be admitted that the underground conflict and persons affected extralaterally are immeasurably more important and hence more entitled to notice, protection, etc., than are mere surface conflict claimants.

Per Curiam:

This is an appeal from a judgment in favor of the respondents in an action to quiet title in the plaintiff, appellant herein, to the Los Gazabo lode mining claim.

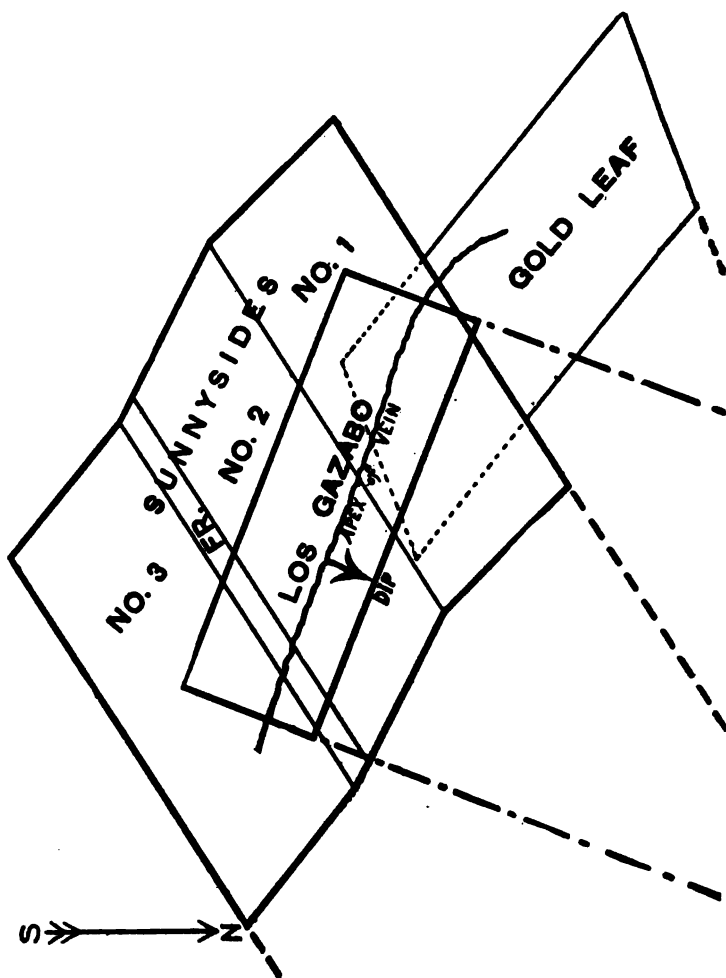
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The Round Mountain Red Top Mining Company and John F. Davidson, defendants in the court below, are not affected by the questions raised by the appeal in this case. The complaint, among other matters, alleges: "That, under and by virtue of a patent from the United States therefor, the plaintiff is the owner, and for a long time past has been and now is in the possession and entitled to the possession of the Los Gazabo lode mining claim and location, Survey No. 2,815, in said Round Mountain or Jefferson mining district; and said Los Gazabo location has parallel end lines, and it is described by metes and bounds as follows: [Here follows the description.] That said Los Gazabo lode or vein so far departs from a perpendicular on its dip and on its downward course into the earth, and within vertical planes drawn downward through the end lines of said Los Gazabo location, so continued in their own direction, as that it extends outside of the vertical side lines of said Los Gazabo location on the surface, and into, through, and across the underground portion of certain lands claimed by the defendants as being the Gold Leaf and the Black Hawk so-called lode mining locations, and as being the property of the defendants."

The defendant, the Round Mountain Sphinx Mining Company, respondent herein, in its amended answer denied the validity of the said Los Gazabo lode mining claim, and alleged that said Los Gazabo claim was located entirely within the surface boundaries of certain prior existing mining claims known as and called the Sunnyside No. 1, Sunnyside No. 2, Sunnyside Fraction, and Sunnyside No. 3 lode mining claims. And as a further answer defendant alleged: "That it is the owner of, possessed of, and entitled to, the possession of that certain lode mining claim called the Gold Leaf lode, situate in the Round Mountain or Jefferson mining district, county of Nye, State of Nevada, and more particularly described as follows: [Here follows description of claim.] That within the exterior boundaries of

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said Gold Leaf claim there is disclosed in the discovery a lode, vein, or ledge, * * * the general course or strike of the top or apex of which is northerly and southerly, said lode, vein, or ledge entering the southerly end line and running parallel to the side line thereof, passing out of the northerly end line of said claim; that said Gold Leaf lode, vein, or ledge on its dip from the apex extends to, beneath, and beyond the northeasterly side line of said claim, and the defendant Round Mountain Sphinx Mining Company is the owner of said vein



within vertical planes drawn downward through the end lines of said claim extended in their own direction indefinitely, and includes the vein claimed by plaintiff as the pretended Los Gazabo veins."

The diagram (see p. 414) shows the relative locations of the Sunnyside claims, the Los Gazabo claim, and the Gold Leaf claim, the ledge and its dip, and the ledge on its dip in controversy.

At the trial, plaintiff introduced a patent issued by the United States as evidence of its ownership of the Los Gazabo mining claim. This patent was a group patent of the Sunnysides and Los Gazabo claims, and on its face the description of the Los Gazabo claim is in conflict with Sunnysides Nos. 1, 2, 3, and Sunnyside Fraction location; all these claims being described in and the patent purporting to grant them all as described by metes and bounds. Only a minute portion of the Los Gazabo location projects beyond and is free from conflict with the other locations. No portion of the apex of the lode in controversy is situated in this nonconflicting area. It is the contention of the respondent, and the lower court so held, that, in view of this conflict appearing on the face of the patent itself, the patent was ambiguous, and it was competent to go behind the patent and determine the question of priority between the Los Gazabo and the Sunnyside claims described by the patent. The respondents contended, and the trial court so held, that the Sunnysides were entitled to priority over the Los Gazabo, thus rendering the Los Gazabo invalid as far as it conflicted with the Sunnysides. Outside of certain legal questions involved, the main question of fact was as to the priority of locations of the Sunnysides as against the Los Gazabo claim.

[1] As repeatedly held by this court, findings of the lower court upon conflicting evidence are binding upon this court. This case appears to have been tried with great care by the lower court, and, after a careful examination of the record and the briefs of counsel, we are satisfied that the trial court arrived at a correct conclusion. The opinion filed in the case by Judge Stevens

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covers the case so fully that this court has adopted the greater portion thereof as the opinion of this court. From the opinion rendered by the trial judge, we quote with approval the following:

"The Gold Leaf claim did not file an adverse to the application for patent, made by the plaintiff, for the Sunnyside and Los Gazabo claims, and the patent for said claims therefore includes so much of the surface ground of the Gold Leaf as conflicted with the Sunnysides and Los Gazabo, and there is no controversy in this action respecting the surface rights of the respective parties, and, the defendant Round Mountain Sphinx Company having dismissed its counterclaim for damages alleged in its separate answer, the only issue to be determined is as to the extralateral rights acquired by the plaintiff by its patent to the Los Gazabo claim. The evidence clearly shows that the lode or vein, known as the Los Gazabo, and which has its apex within the surface lines of the Los Gazabo or Sunnyside claims, on its dip beneath the surface, extends toward and through the Gold Leaf and Black Hawk claims, and that the plaintiff, in prosecuting the development on the Los Gazabo, has entered into the Gold Leaf and Black Hawk claims, and has extracted and removed a large amount of ore therefrom.

[2] "The evidence further shows that the lode or vein, known as the Los Gazabo lode, is a cross vein of the Sunnyside claims, and that, in prosecuting the development of said lode, the plaintiff has departed from the westerly side line of Sunnyside No. 1, which would constitute the westerly end line of the claim in determining the extralateral rights of the plaintiff, and, if the Los Gazabo location should be held invalid, the side lines of the Sunnyside claims would become the end lines, across which, as they extend downward vertically, the plaintiff cannot follow the vein, and could not enter upon or into the premises in dispute, which are shown to be outside of vertical planes drawn downward through those lines. (*Flagstaff M. Co. v. Tarbet*, 98 U. S. 463, 25 L. Ed. 253; *Wolfley v. Lebanon M. Co.*, 4 Colo. 112.)

[3] "The record shows that the Los Gazabo location was a junior location, and the location certificate filed by Scott, *et al.*, the locators of said claim, and introduced in evidence by the plaintiff, recites that the claim 'is wholly within the boundaries claimed by Sunnyside Nos. 1, 2, and 3.' This declaration of itself is sufficient to cast the burden upon the locators to show that the Sunnyside claims were invalid. The mining acts of Congress authorize location of mining claims upon the unoccupied and unappropriated mineral lands of the United States. Nowhere in the recitals contained in the original location certificate of the Los Gazabo does it appear that the land in question was of a character which the law authorizes a location upon. * * * If the Sunnyside claims were valid and existing locations at the time the Los Gazabo was located, it is clear that the latter location was void. (*Belk v. Meagher*, 104 U. S. 284, 26 L. Ed. 735; *Reynolds v. Pasco*, 24 Utah, 219, 66 Pac. 1064; *Armstrong v. Lower*, 6 Colo. 393.)

"I think the proof is clear that the Sunnyside locations Nos. 1, 2, and 3 were made on the 20th day of February, 1906. The location and amended location certificates of the several claims show that all the acts necessary to constitute valid locations were performed by the locators and within the time required by law. The amended and additional location certificates filed by the plaintiff company allege the date of the discovery to be on the 20th day of February, 1906. The evidence of McDonald shows that the monuments were erected and the discovery shafts on these claims sunk within the prescribed limit. (Page 273, Transcript of Evidence.)

[4] "Counsel for plaintiff contends that as the law does not make the location certificate *prima facie* evidence of discovery, that such a declaration is not binding upon the plaintiff; but I am of the opinion that, while it might not be sufficient evidence as against the defendants, the declarations contained in the record by which the patent was obtained is some evidence that can be considered in the absence of proof that the record does not state the truth. If more were needed, I think the

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evidence of the president of the plaintiff company, James R. Davis, is conclusive upon this point.

[5] "I can reach no other conclusion but that on the 3d day of March, 1906, the date of location of the Los Gazabo claim, the Sunnysides Nos. 1, 2, and 3 were valid existing locations, and that the location of the Los Gazabo was based upon a discovery of mineral within the limits of the Sunnyside claims, and was therefore void. (*Belk v. Meagher, supra*, 104 U. S. 284, 26 L. Ed. 735; *Reynolds v. Pasco*, 24 Utah, 219, 66 Pac. 1064; *Tuolumne Con. Co. v. Maier*, 134 Cal. 583, 66 Pac. 863; *Golden Terra Co. v. Mahler*, 4 Morr. Min. Rep. 390, 2 Dak. 377, 11 N. W. 98; *Armstrong v. Lower, supra*, 6 Colo. 393.)

[6] "Counsel for plaintiff contends, however, that a patent, having been issued to the plaintiff by the land department, is a conveyance of the legal title to the patentee after the matter has been adjudicated by the proper tribunal, and like other judgments is impervious to collateral attack, and I think this contention is correct so far as the adjudication of any matters which were before the tribunal for adjudication and as against all persons who were parties to the adjudication. I am satisfied that the defendants would be estopped to deny the validity of the patent so far as the Sunnyside claims are concerned, and defendants do not question its validity with reference to the surface ground within the boundaries of those claims, nor any extralateral rights which accrue to plaintiff by virtue of the patent to the Sunnyside claims.

"As the Gold Leaf failed to file an adverse to the application of plaintiff for patent, the adjudication of the land department is conclusive as to the rights of the parties to the surface ground included in the application, but the validity of the Los Gazabo claim was not before the department, and could not be questioned by the Gold Leaf in that proceeding. There was nothing at that time to show that the plaintiff was attempting to acquire any rights which could conflict with the rights of the defendants.

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[7, 8] "The government had a right to convey the land included within the surface boundaries of the Sunnyside locations, as the Sunnyside claims, which had been regularly and legally segregated from occupancy or appropriation by another, and, the Los Gazabo being wholly located within the boundaries of claims already segregated being void, the government had no further rights to convey by the Los Gazabo patent. (*Rose v. Richmond M. Co.*, 17 Nev. 26; *South End Mining Co. v. Tinney*, 22 Nev. 19.)

[9] "Again, this is an equitable action to quiet the title to the Los Gazabo lode or vein, which involves the question of extralateral rights which were not involved in the proceedings for patent, and the defendants are not estopped from questioning the validity of the location of the claim under which the plaintiff seeks to enforce such extralateral rights as against them. (*United States M. Co. v. Lawson*, 134 Fed. 769, 67 C. C. A. 587; *Lawson v. United States M. Co.*, 207 U. S. 1, 28 Sup. Ct. 15, 52 L. Ed. 65; *Bunker Hill M. Co. v. Empire State M. Co.*, 108 Fed. 189.)

[10] "The validity of such patent may be pleaded as a defense in any action, and may be tried upon the same principles as an original bill in equity. (*South End M. Co. v. Tinney*, 22 Nev. 19; *Rose v. Richmond*, 17 Nev. 26.)

"To sustain its contention in this case, the plaintiff cites the case of *Tonopah and Salt Lake Mining Co. v. Tonopah Mining Co.*, 125 Fed. 408 (decided by Judge Hawley), but the facts in that case are entirely different from the facts in this case. In the case cited it clearly appears that a discovery of mineral was made by the junior location entirely outside of the boundaries of the senior location. In this case the contention is not and cannot be made that any discovery of mineral was made outside of the boundaries of the Sunnyside claims.

"Judge Hawley, in his decision in the case cited, used the following language: 'Conceding, as we have throughout this case, that the location of a mining claim, based exclusively on a discovery of mineral within the limits of another existing and valid location, is void.'

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He also quotes the language of the Supreme Court of the United States in the case of *Gwillim v. Donnellan*, 115 U. S. 45, 5 Sup. Ct. 1110, 29 L. Ed. 348, as follows: 'That the location as made by the locator must be one which entitles him to possession as against the United States, as well as against another claimant, if it is not valid as against the other. The location is the plaintiff's title. If good, he can recover. If bad, he must be defeated. A location on account of the discovery of a vein or lode can be made by a discoverer, or one who claims under it. The discovered lode must lie within the limits of the location which is made by reason of it. If the title to the discovery fails, so must the location which rests upon it.'

"I cannot find that any of the authorities cited sustain the location of the so-called Los Gazabo lode, and I can reach no other conclusion than that such location was void, and that the patent, issued by the land department, could give such location no legal vitality. * * * Having found, as a matter of fact, that the patent to the so-called Los Gazabo is invalid for any purpose, as a conclusion of law, the court finds that the plaintiff should take nothing by its suit, and that the defendants should have judgment for their costs herein expended."

That the government cannot convey the same tract of land twice has been too frequently decided to require citation of authorities. It cannot convey conflicting areas of mining claims to two parties, for in such case one of the grants must of necessity be void. It follows as a necessary sequence that, where the government issues a patent to a group of mining claims purporting to grant the same surface to different claims constituting the group, all the several grants cannot be valid, so far as the conflicting area is concerned. So far as the surface conveyed by the group patent is concerned, it makes no difference, but when it comes to extralateral rights, as in this case, it becomes of the greatest importance which particular grant carries the surface including the apex.

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[11] It may be conceded that the land department has jurisdiction to determine the question of priority as between conflicting lode locations embraced in the same group application, but in the case of the Sunnyside-Los Gazabo application it failed to exercise such jurisdiction. The patent under consideration contains no exclusion of conflict area from one claim in favor of another. Neither in the verified application for patent, the published notice, nor its final application to purchase, did the appellant make any exclusion in favor of the Los Gazabo. It applied for and received a patent to these conflicting claims which made no mention of the conflict.

[12] The field notes made by appellant's surveyors contained such an exclusion, made upon the direction of appellant's attorney. Appellant offered these notes in evidence, and error is assigned in their exclusion. We think no prejudicial error could have thus been committed, for the exclusion in the notes, under the circumstances, was a self-serving act by an agent of the plaintiff which could not be binding on respondent. While these surveyor's field notes were before the land department, there was also the sworn statement contained in the application for patent that the Sunnyside locations were prior to the Los Gazabo.

[13] It is manifest that the land department did not determine the question of priority, but made a double grant of the conflicting area. This appearing upon the face of the patent, the question of priority was a matter which the trial court had power to consider and determine. This was not a collateral attack upon the patent, but a determination of the effect of a patent containing ambiguous provisions. As appellant was relying on the patent as a valid grant of the Los Gazabo location, the patent on its face being ambiguous in that it did not show a priority of location in favor of any of the claims granted by the patent and which covered the conflicting area, the burden of proof was upon the appellant to explain the ambiguity and establish the priority of the Los Gazabo location.

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The contention that the defendant Round Mountain Sphinx Mining Company, as owner of the Gold Leaf claim, not having filed an adverse claim to plaintiff's application for patent, it is now precluded from questioning its validity, is, we think, without merit. It cannot, of course, question the validity of the surface conveyed, but as the patent contains grants of distinct mining claims described by metes and bounds, in conflict with each other, and controlling extralateral rights in different directions, it can insist on a determination to which particular claims the apex of the ledge belongs as controlling the extralateral rights.

The judgment is affirmed.

NOTE—At the time of printing this volume petition for rehearing the foregoing case is pending.

REPORTS OF CASES
DETERMINED IN
THE SUPREME COURT
OF THE
STATE OF NEVADA

JANUARY TERM, 1913

[No. 1955]

GOLDFIELD MOHAWK MINING COMPANY,
APPELLANT, *v.* FRANCES-MOHAWK MINING
AND LEASING COMPANY, RESPONDENT.

1. APPEAL AND ERROR — DISCRETIONARY RULING — GRANTING NEW TRIAL.

Orders of the trial court granting new trial for insufficiency of conflicting evidence will not be disturbed, in the absence of a clear abuse of discretion.

APPEAL from the Seventh Judicial District Court, Esmeralda County, Nevada; *Theron Stevens*, Judge.

Action by the Goldfield Mohawk Mining Company against the Frances-Mohawk Mining and Leasing Company. From an order granting a new trial, plaintiff appeals. **Affirmed.**

The facts sufficiently appear in the opinion.

W. H. Bryant and *Henry M. Hoyt*, for Appellant:

The plaintiff-appellant was in law entitled to the exercise of a sound legal discretion by the court below, and by a misconception on the part of the judge of said court, constituting reversible error, the order was improvidently made, without the exercise of any legal

Argument for Respondent

discretion, and hence the motion for a new trial has not even yet been legally passed upon by the lower court.

Under the law one who has obtained a verdict and a judgment in a civil action is entitled to have the benefit of the same as against a motion for a new trial upon the ground under discussion, namely, alleged insufficiency of the evidence to justify the verdict, unless the court, in the exercise of a sound legal discretion, finds upon reviewing all of the evidence in the case that the verdict is very clearly and palpably contrary to the decided weight of the evidence. This is elementary. If, then, a plaintiff has been deprived of the benefit of such verdict and judgment by the court granting a new trial without finding that the evidence is clearly and palpably insufficient to justify the verdict, the plaintiff has been unlawfully deprived of a clear legal right; the court has not exercised a sound and legal discretion. (*State v. Yellow Jacket M. Co.*, 5 Nev. 422; *Phillpotts v. Blasdel*, 8 Nev. 76; *Solen v. V. & T. R. R. Co.*, 13 Nev. 135; *Albion Con. M. Co. v. Richmond M. Co.*, 19 Nev. 225; *Occidental S. M. Co. v. Comstock T. Co.*, 125 Fed. 244; *Fulton v. Crosby*, 49 S. E. 1012; 37 Cent. Dig. "New Trial," secs. 130-166; 15 Dec. Dig. secs. 70-72; Current Law, vols. 2, 6, "New Trial and Arrest of Judgment"; *Pringle v. Guild*, 119 Fed. 962; *Pleasants v. Fant*, 22 Wall. 116.)

The expense of trial of such a case as this, in which the cost bill on file amounts for plaintiff to \$7,797.20, suggests the propriety of emphasizing the fact that a plaintiff should not lightly be deprived of his verdict and judgment and put to the double cost of a new trial when it may be avoided by the simple expedient of sending the case back to the district court for the purpose of having the motion passed upon in accordance with the legal principles involved.

Thompson, Morehouse & Thompson, for Respondent:

We need not cite authorities as to when and under what circumstances the trial court should grant a new trial for "insufficiency of the evidence to justify the verdict," because this court, in its opinion granting the

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motion to remand herein, has not only specifically quoted from decisions of various courts, but has in all cited some sixty-five cases as a guide to the trial judge indicating to him his duty in the premises and stating the true rule for his conduct, and under these authorities he had to grant the new trial, entertaining as he did, after hearing the whole case, the opinion he had, based as it was upon the evidence in the case, and therefore we need only argue the duty of this court upon this appeal. (*Edwards v. Carson W. Co.*, 21 Nev. 469; *People v. Knott*, 111 Cal. 453; 14 Ency. Pl. & Pr. 979-981, 987; *McCafferty v. Flinn*, 32 Nev. 269; *McLeod v. Lee*, 14 Nev. 398.)

Per Curiam:

This is an appeal from an order granting a new trial, and is the second appeal in the action. (33 Nev. 491, 503.)

Respondent upon this appeal was appellant upon the former appeal, and the question there determined was whether the order denying the motion for a new trial had been improvidently entered because "the trial judge in the present case, misconceiving his judicial duty, fell into grave error in failing and refusing to pass upon this ground (insufficiency of the evidence to justify the verdict) assigned by the defendant for a new trial." For this reason the order denying the motion for a new trial was "set aside, with instructions to the court below to consider and pass upon the ground for a new trial interposed by the defendant, 'of the insufficiency of the evidence to justify the verdict,' for which purpose the case is herewith remanded."

In passing upon the motion originally, the trial judge said: "I was not surprised that the defendant was dissatisfied with the verdict. A verdict of this kind could hardly result otherwise than as a surprise, and the defendant naturally feels that justice has been outraged." (33 Nev. 493.)

In passing upon the motion for a new trial the second time, in pursuance of the order of this court, the trial judge granted a new trial upon the ground of "insufficiency of evidence to justify the verdict," and in his

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opinion rendered thereon said: "I have neither the time nor the inclination to review the evidence presented to the jury, and presumably upon which the verdict was based, but will simply say that my judgment of the facts was and is utterly at variance with the verdict of the jury. In my judgment, the verdict was not supported by a preponderance of the evidence; that the verdict of \$75,000 in favor of the plaintiff rendered by the jury was not justified by the evidence. The motion of defendant to vacate and set aside the verdict and grant a new trial on the ground of 'insufficiency of the evidence to justify the verdict' should be sustained, and it is so ordered."

Hayne on New Trial and Appeal says: "Where there is a substantial conflict in the evidence, the appellate court will not disturb the decision of the court below. This rule has been announced more frequently than any other rule of practice. It applies equally where the court below granted as where it denied the motion for a new trial. * * * The rule as to conflict does not apply to the court below. The judge of such court should set aside the verdict whenever it is against the weight of the evidence, notwithstanding the fact that there is a substantial conflict in the testimony." (Hayne, Rev. Ed. 1912, vol. 2, sec. 288, pp. 1614, 1645.)

In *Golden v. Murphy*, 27 Nev. 392, this court, considering the rule governing an order of this kind, said: "On behalf of appellants it is urged that the order granting a new trial is error, because an invasion of the province of the jury, even if the evidence is conflicting. * * * It was held in *Worthing v. Cutts*, 8 Nev. 121, that, when a new trial is granted in the lower court upon the ground that the verdict is not warranted by the evidence, the rule invariably governing the appellate tribunal is not to disturb the action of the judge below if there is a material conflict in the evidence. In *Treadway v. Wilder*, 9 Nev. 70, this court stated: 'It must be borne in mind that the *nisi prius* courts, in reviewing the verdicts of juries, are not subject to the rules that govern appellate courts. They may weigh the evidence, and, if they think injustice has been done, grant a new trial, where appellate

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courts should not or could not interfere. The question under consideration has been so often presented that opinions have become stereotyped. Nothing need be added to, or taken from, the rule, so well established, often declared, and always followed.' The numerous cases in this state and California cited in respondent's brief, and Hayne on New Trial and Appeal, sec. 97, and Hilliard on New Trials, p. 488, are to the same effect."

In *Albion M. Co. v. Richmond M. Co.*, 19 Nev. 231, this court by Hawley, J., said: "The jury were primarily the judges of the credibility and weight of the testimony of the respective witnesses. The district judge, however, 'has jurisdiction, on motion for a new trial, to decide, as a question of fact, whether the scale of evidence which leans against the verdict very strongly predominates' (*Phillpotts v. Blasdel*, 8 Nev. 76), and, if there is in his opinion a 'clear preponderance of evidence against it,' he 'should not hesitate to set aside the verdict' (*State v. Yellow Jacket S. M. Co.*, 5 Nev. 422); but, in the exercise of this power, he 'should be careful not to invade the legitimate province of the jury, when they have manifested a fair and intelligent consideration of the evidence submitted to them.' (*Solen v. V. & T. R. R. Co.*, 13 Nev. 135.) The district court 'ought not to grant a new trial when there is conflicting evidence, except the weight of evidence clearly preponderates against the verdict.' If the district court grants a new trial upon this ground, 'the appellate court will not interfere unless the weight of evidence clearly preponderates against the ruling of the district court.' (*Treadway v. Wilder*, 9 Nev. 70.)"

This court in *Edwards v. Carson Water Co.*, 21 Nev. 492, by Murphy, C. J., said: "The granting or refusal of a motion for a new trial on the ground of the insufficiency of the evidence to support the findings is addressed to the sound discretion of the judge who presided at the trial of the case in the lower court, and on an appeal from such order, where the court below, in the exercise of a sound discretion, grants a new trial on conflicting evidence, appellate courts have always refused to disturb the order. (*Kellenberger v. Market Street Cable*

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Railway Co., 33 Pac. 90.)" See, also, *McLeod v. Lee*, 14 Nev. 398; *McCafferty v. Flinn*, 32 Nev. 269.

The contention of counsel for appellant "that in violation of law he (the trial judge) has merely substituted his judgment of the facts for the judgment of the jury," and hence has not yet legally disposed of the motion for a new trial, is not well taken. He has definitely passed upon the ground of the motion "insufficiency of the evidence to justify the verdict," and has granted the motion on that ground. It becomes a question, then, for us to determine, under the established rules, whether he has abused the discretion given him by the statute. That there is a conflict in the evidence is not disputed. That there is evidence sufficient to support the verdict under the well-established rule applicable in case the motion for a new trial has been denied must, doubtless, also be conceded. But a new trial having been granted upon the ground of insufficiency of the evidence, under the many authorities cited in this and the former opinion rendered in this case, we are not permitted to disturb the order, unless we can say that the trial judge manifestly abused the discretion reposed in him by the statute. (*In re Martin*, 113 Cal. 479, 45 Pac. 813.) This we are unable to say.

The order appealed from is affirmed.

Points decided

[No. 2048]

STATE OF NEVADA, EX REL. JACOB EGGERS, STATE CONTROLLER, PETITIONER, v. E. P. ESSER, GEORGE KITZMEYER, AND JOSEPH ROCHON, AS COUNTY COMMISSIONERS, AND EDWARD O. PATTERSON, AS COUNTY CLERK AND TREASURER, OF ORMSBY COUNTY, NEVADA, RESPONDENTS.

1. STATUTES—TITLES—SUBJECT-MATTER.

Stats. 1911, c. 133, entitled "An act concerning public schools," section 135 of which provided for a tax for the support of the public schools, was not void for embracing a subject not included in the title, contrary to Const. art. 4, sec. 17; Rev. Laws, 275.

2. STATUTES—CONSTRUCTION—IN PARI MATERIA.

Statutes which relate to the same subject-matter are *in part materia* and should be construed together.

3. STATUTES—CONFLICT—REPEAL.

If two statutes are irreconcilably conflicting, the last enacted controls.

4. SCHOOLS AND SCHOOL DISTRICTS—TAXATION—STATUTES—IMPLIED REPEAL.

The act of March 18, 1911 (Stats. 1911, c. 90, sec. 1), Rev. Laws, 3617, imposing a tax of 6 cents on the \$100 for the general school fund, was impliedly repealed by the act of March 20, 1911 (Stats. 1911, c. 133, sec. 135), Rev. Laws, 3374, imposing a tax of 10 cents on the \$100 for school purposes; the statutes being irreconcilably in conflict.

5. TAXATION—UNIFORMITY.

Stats. 1911, c. 133, sec. 135, Rev. Laws, 3374, imposing a tax on all taxable property in the state for school purposes, and requiring the county commissioners to add such amount to the other taxes, could take effect during the fiscal year 1911, without violating the constitutional requirement of equality and uniformity, though it resulted in two different levies during the same fiscal year..

ORIGINAL PROCEEDING for a writ of *mandamus* by the State, on the relation of J. Eggers, as State Controller, against E. P. Esser and others, as County Commissioners, and E. O. Patterson, as County Treasurer, of Ormsby County. **Writ issued.**

The facts sufficiently appear in the opinion.

Argument for Petitioner

Geo. B. Thatcher, Attorney-General, and *Edward T. Patrick*, Deputy Attorney-General, for Petitioner:

Section 135 of the public school act is constitutional. The insertion of a section providing a means for procuring revenue for the support and maintenance of public schools is "germane to the subject." (Cooley, Const. Lim. pp. 208, 209; *State v. Ah Sam*, 15 Nev. 27; *Klein v. Klein*, 16 Nev. 194.)

It is manifest that the legislature, by providing one act for state school tax of six cents, and a later act for ten cents, intended to repeal the first provision, and such intention should be "carried out, no matter how awkwardly expressed or indicated." (*Thorpe v. Schooling*, 7 Nev. 15.)

The petitioner possibly does not grasp the reasoning in regard to this not being a retrospective statute embraced in the last three pages of the respondent's brief, but it appears to petitioner that this question is not involved herein. It will be observed that the language levying these respective taxes is practically identical.

If the first act levied a tax, the second certainly did. The question then arises when this tax was levied, and in addition to the provision of Rev. Laws, 4127, that "every law shall take effect and be in force from and after its passage, unless such law shall prescribe a different time," we have for information on the subject the provisions of Rev. Laws, 3619.

The county commissioners certainly could not levy the state tax upon the taxable property of their county until the rate was fixed by the legislature, for it has been decided that "the levy of state taxes by the board of county commissioners, though provided for in the revenue law, is an idle ceremony, for the reason that the levy is made by the legislature." (*State v. Manhattan S. M. Co.* 4 Nev. 318.)

In petitioner's opinion the legislature fixed the state tax levy by act approved March 18, 1911, at sixty cents, of which six cents was for the school fund, and afterwards, for reasons with which the judicial department has no concern, the rate of the state tax levy for that

Argument for Respondents

year was fixed at sixty-four cents by the act approved March 20, 1911, of which ten cents was for the school fund.

In the opinion of petitioner all the questions raised by respondent have been settled adversely to his contention in the case of *Ex Parte Ah Pah*, 34 Nev. 283.

George L. Sanford, for Respondents:

The only question is: Was this act providing for a sixty-cent rate and a six-cents apportionment to the school fund repealed or modified by "An act concerning public schools, and repealing certain acts relating thereto," approved March 20, 1911, and particularly section 135 of said act? It (sec. 135) is unconstitutional, as the subject-matter is not properly embraced in the title of the act. The subject of levying and collecting a tax for school purposes is not expressed in the title of the act, as required by section 17, article 4, of the constitution of Nevada.

The rate of taxation in Nevada and the public schools of Nevada certainly do not form one subject; they cannot be logically coupled or combined as attempted in section 135 of the act in question. (*State v. Silver*, 9 Nev. 227; Cooley, Const. Lim. 7th ed. 211.)

Is section 135 of the school act sufficient to repeal by implication the act relating to taxes of March 18, 1911? The rule is well established that repeals by implication are not favored. However, a new statute revising the whole subject-matter of a former law repeals it, though containing no express words to that effect. Clearly this case does not come within this established rule. (*Thorpe v. Schooling*, 7 Nev. 15; *State v. Rogers*, 10 Nev. 319; *Estate of Walley*, 11 Nev. 260; *State v. Donnelly*, 20 Nev. 214.)

Unless otherwise provided statutes are prospective and not retrospective. They are effective from the day of their approval.

We concede that the legislature had the right to make the act in question retrospective; the fact is it did not do so. There is no language used in the act evincing any

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such intent. It is apparent on the face of the statute that it was intended to apply to the future, not the past. (*Chew Heong v. U. S.*, 112 U. S. 536; *Murray v. Dew*, 24 How. 242; *Solm v. Watterson*, 17 Wall. 596; *In re Twenty Per Cent Cases*, 20 Wall. 179; *Dash v. Van Kluck*, 7 Johns. 477; *Sanford v. Bennett*, 24 N. Y. 20; *Dodge v. Nevada National Bank*, 109 Fed. 726; *Hunter v. Savage M. Co.*, 4 Nev. 153; *State v. Manhattan-Verde Co.*, 32 Nev. 474; *Milliken v. Sloat*, 1 Nev. 573.)

Clearly this act is not retrospective in operation; it is prospective. Consequently, if section 135 of the school tax law fixed the rate at ten cents for school purposes from March 20, 1911, what was the rate for the year 1911 prior to that time? There would be two rates for the year 1911, one of sixty cents up to and including March 20, 1911, and subsequent to that a rate of sixty-four cents on the \$100.

In conclusion we submit that the act of March 18, 1911, providing for a general tax levy fixed the rate for that year at sixty cents on the \$100 and the property throughout the state became impressed with a lien for the payment of the same immediately (*Dodge v. Nevada Bank*, 109 Fed. 726); that the act of March 20, 1911, concerning public schools and particularly section 135 did not directly or indirectly nor by implication repeal the provisions of said act; that conceding said section 135 is constitutional it is prospective in effect and as the tax rate for the year had been determined and fixed and all property became impressed with a lien therefor as provided by law, the provisions of the act are in abeyance so far as the tax rate is concerned for the year 1911.

By the Court, NORCROSS, J.:

This is an original proceeding in *mandamus* to require respondents, commissioners, at the time of the making of the next annual tax levy for said county of Ormsby, to levy an additional tax, sufficient to raise therefrom the sum of \$547.54 due from said Ormsby County to the State of Nevada, and that, when said sum has been so realized

from such levy, that respondent treasurer be commanded to pay the same over to petitioner as required by law. The question involved in this case is, What was the legal state levy of taxes for state general school purposes for the year 1911?

An act entitled "An act to fix the state tax levy, and to distribute the same in the proper funds," which became a law, by approval of the governor, March 18, 1911, reads:

"SECTION 1. For the fiscal year commencing January first, nineteen hundred and eleven, and annually thereafter, an ad valorem tax of sixty cents on each one hundred dollars of taxable property is hereby levied and directed to be collected for state purposes, upon all taxable property in the state, including net proceeds of mines and mining claims, except such property as is by law exempted from taxation: General fund, thirty-nine and six-tenths cents; state interest and sinking fund, three cents; territorial interest fund, three cents; general school fund, six cents; contingent university fund, five cents; contingent university fund, 1905, No. one, one-tenth of one cent; contingent university fund, 1905, No. two, three-tenths of one cent; state prison interest and sinking fund, three cents." (Stats 1911, p. 106; Rev. Laws, 3617.)

Section 135 of an act entitled "An act concerning public schools, and repealing certain acts relating thereto," which became a law, by the approval of the governor, March 20, 1911, provides:

"SEC. 135. An ad valorem tax of ten cents on the hundred dollars of all taxable property in the state is hereby levied and directed to be collected and paid in the same manner as other state taxes are required to be paid; and said tax shall be known as the state school tax, and the board of county commissioners of the several counties shall, annually, at the same time other state taxes are levied, add this to the other taxes provided by law to be levied and collected, and it shall be annually collected at the same time and in the same manner as other state taxes are collected, and if, from any reason whatever, in

any year said taxes are not levied as herein required, by the board of county commissioners, the county auditor shall enter them on the assessment roll, as required by law for other taxes." (Stats. 1911, p. 220; Rev. Laws, 3374.)

Sections 134 to 152½, incl., of the act last mentioned (Rev. Laws, 3373-3392) constitute chapter 10 of the act entitled "school funds," and deal with the whole subject of school funds.

Section 2 of article 9 of the state constitution, dealing with the subject of "finance and state debt," provides:

"SEC. 2. The legislature shall provide by law for an annual tax sufficient to defray the estimated expenses of the state for each fiscal year; and whenever the expenses of any year shall exceed the income, the legislature shall provide for levying a tax sufficient with other sources of income, to pay the deficiency, as well as the estimated expenses of such ensuing year or two years." (Rev. Laws, 349.)

Section 6 of article 11 of the state constitution, dealing with the subject of education, provides:

"SEC. 6. The legislature shall provide a special tax, which shall not exceed two mills on the dollar of all taxable property in the state, in addition to the other means provided for the support and maintenance of said university and common schools." (Rev. Laws, 358.)

The statement, which we presume is correct, is made in the opening brief of counsel for respondents that for the fiscal year 1911 "the counties of Churchill, Douglas, Elko, Eureka, Humboldt, Nye, Storey, Washoe, and Ormsby, levied and collected at the rate of sixty cents on the \$100; the state superintendent of schools some time subsequently called attention to the act concerning public schools, and particularly section 135 thereof, and the following counties levied the rate of sixty-four cents, thereby increasing the school tax to ten cents: Clark, Esmeralda, Lander, Lincoln, Lyon, Mineral, and White Pine Counties." This is a test suit to determine the liability of the first-named counties to levy and

collect the four cents difference in the school rate made by section 135 of the school law, *supra*.

The only question discussed in the briefs is, Did section 135 of the school law, *supra*, make a valid levy for general school purposes of ten cents on the \$100 of taxable property for the year 1911? It is the contention of counsel for respondents that it did not, for two reasons: First, that section 135 is unconstitutional and void because relating to a subject not embraced in the title of the act of which it is a part (Const. art. 4, sec. 17; Rev. Laws, 275); second, that section 135 is prospective in effect, and as the tax rate for the year had previously been determined and fixed, and all property had become impressed with a lien therefor as provided by law, its provisions are in abeyance, so far as the tax rate is concerned, for the year 1911.

[1] The contention that the section of the school act in question is violative of the constitution is clearly without merit. A provision for a tax for the support of public schools is certainly germane to an act "concerning public schools." (*Ex Parte Ah Pah*, 34 Nev. 283.) It is conceded that the six cents for the "general school fund" provided for in the act to fix the state tax levy, approved March 18, 1911, and the tax of ten cents, which shall be known as the "state school tax," mentioned in section 135 of the general school law, approved March 20, 1911, are levies for one and the same purpose.

[2] In so far as the two sections relate to the same subject-matter, they are *in pari materia* and should be construed together.

[3] In so far as there is any irreconcilable conflict between the two sections, the section which last became a law controls the provisions of the earlier enactment.

[4] The six- and the ten-cent provisions of the two sections being in conflict, the ten-cent levy for school purposes, being included in the law last to take effect, supersedes the levy made for the same purpose in the earlier enactment.

[5] There is no merit, we think, in the contention that,

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because section 135 is not by its terms retrospective, it cannot be deemed to take effect during the fiscal year 1911, for the reason that there would be two different levies in force during different portions of the year, in violation of the constitutional provision requiring equality and uniformity in rates of assessment and taxation. (Rev. Laws, 352.)

There is no provision in the state constitution fixing a maximum levy beyond which the legislature may not go, as in the case of statutory provisions regulating the levy by county commissioners for county purposes. There is also no provision to the effect that, after the legislature has made one levy, it may not make another levy changing the rate fixed in the former levy. Most, if not all, of the tax levies made by the legislature have been acts which would apply to all succeeding years, unless changed by subsequent legislation. Whenever a change was made in the rate, as has occurred frequently, it could technically be said that two different state rates were in force during different portions of the year. In effect, however, this is not the case. The only difficulty that could be imagined as occurring by reason of the change in the rate would be in cases where the assessor had collected taxes upon personal property before the controlling state rate had been fixed for the year. The assessor does not usually, if ever, collect the tax on personal property when the owner has real property assessed to him, for the amount of the tax on the personal property, in such case, is made a lien on the real property, and the tax thereon is not required to be paid prior to December following. (Rev. Laws, 3619.) Of the tax collected by the assessor on personal property from owners not having real estate, but a small portion, doubtless, in practice, is collected between the date of the county levy and the 1st of April. But, conceding that the assessor may collect the state and county tax on personal property prior to a change in the state rate, such property is not immune from the collection of a further tax in case the state rate is subsequently increased. It is as much liable for the additional

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tax as any other property not as yet assessed. The rule of uniformity in rate or assessment is not violated by the subsequent change in the state rate.

We are of the opinion that Ormsby County, and all other counties similarly situated, are liable to account to the state controller, for taxes for the year 1911, on a basis of a state rate of sixty-four cents upon the one hundred dollars of taxable property, as contended for by petitioner. As the legislature is now in session, it can provide that the additional tax required to be paid under the levy of 1911 may not become unnecessarily burdensome. As the money collected from this tax must be paid into the general school fund, and will become available for future expenses, that fact may be taken into consideration in fixing the levy for the present fiscal year.

No question has been raised as to the propriety of issuing the writ in the event petitioner's contention as to the law relative to the tax was sustained, and it is therefore ordered that the writ issue as prayed for.

Points decided

[No. 2006]

C. W. GIRTON, RESPONDENT, v. W. H. DANIELS,
APPELLANT.

1. FRAUDS, STATUTE OF—ORAL AGREEMENT TO DEVELOP MINING CLAIM.

An oral agreement to bear one-third of the expenses of developing a mining claim covered by a two-year lease in consideration of an assignment of a one-third interest is not void under the statute of frauds, where the parties contemplate that the development work shall be completed within a year.

2. FRAUDS, STATUTE OF—ORAL AGREEMENT TO DEVELOP MINING CLAIM.

An oral agreement to bear one-third of the expenses of developing a mining claim covered by a two-year lease was not void under the statute of frauds, where the lease could have been terminated by the act of the parties within one year according to its specific provisions.

3. MINES AND MINERALS—LEASES—RIGHT TO ABANDON.

Under the common form of lease of undeveloped lode mining property, wherein the lessor seeks to have his property developed at lessee's expense, and the latter assumes such burden, the lessee, after discovering that future expenditures would be useless, may abandon the lease.

4. MINES AND MINERALS — CONTRACTS — CONSIDERATION — ASSIGNMENT OF INTEREST IN MINE.

An assignment of a one-third interest in a mining lease was a sufficient consideration for an agreement to bear one-third of the expenses of developing the mine, though the lease proved of no value.

5. APPEAL AND ERROR—FINDINGS.

Court's finding of facts on conflicting evidence is conclusive on appeal.

6. FRAUDS, STATUTE OF—LIABILITY FOR EXPENSES OF DEVELOPMENT—QUANTUM MERUIT.

Where a one-third interest in a mining lease is assigned in consideration of an oral agreement to bear one-third of the expense of development, and the other contracting party pursuant to the agreement thereafter does development work and advances money to pay such expense, the assignee is liable on *quantum meruit* for his share of the work and expense, though their agreement be void under the statute of frauds.

APPEAL from the Fifth Judicial District Court, Nye County; *Mark R. Averill*, Judge.

Action by C. W. Girton against W. H. Daniels. From a judgment for plaintiff, defendant appeals. **Affirmed.**

Statement of Facts

STATEMENT OF FACTS

This is an action for damages for breach of contract. The contract as alleged in the complaint was as follows: "That at Tonopah, Nye County, Nevada, and on or about November 15, 1910, the plaintiff, defendant, and one R. Krabbenhoff made and entered into an agreement, under and by which it was mutually agreed, that said three named persons should be equal coowners of a certain mining lease, and should work and develop certain mining claims covered by said lease, situate at Silver Bow, in said county and state; that each should contribute equally towards the expense of said work and business, and should be equal owners, share and share alike in said lease, as well as in any profits arising from the said business, and in like manner should pay equally all the costs and expenses thereof; that it was further agreed that said three named persons should contribute their own time and labor to said work, or, failing so to do, the one not so contributing should employ a substitute or pay to the persons who did do said work one-third of the total value thereof, to the end that an equal amount of work be either personally done by said persons or its value contributed in cash by each. It was further agreed that, in the event defendant did not personally perform his one-third share of said personal labor, he should either employ a substitute to perform same, or that plaintiff and said Krabbenhoff might perform the labor, and that defendant should pay to plaintiff and said Krabbenhoff for each day's work so done by them for the benefit of defendant at the rate of \$4 per day per man; that it was further agreed that each of the persons named should advance and pay the costs and expense of employing laborers in addition to the work to be done by said above-named three persons. It was further agreed between plaintiff and defendant that plaintiff should advance and pay the defendant's one-third share of all cash expenditures for labor of employees, and for supplies and disbursements incident to or arising from said work or

Statement of Facts

business during the months of December, 1910, and January, 1911, and that defendant would reimburse plaintiff to the full amount of said one-third share of such advances so made by plaintiff for the use and benefit of defendant."

The court made the following findings in the case:

"(1) That on or about November 29, 1910, the plaintiff and one R. Krabbenhoff were the owners of a certain mining lease dated November 15, 1910, for two years, on seven lode claims, situate in Silver Bow mining district, Nye County, Nevada; that plaintiff owned a two-thirds interest, and said Krabbenhoff a one-third interest; that on or about said November 29, 1910, the plaintiff and the defendant entered into an agreement under which defendant was to receive one-half of plaintiff's said two-thirds interest or a one-third interest in the whole lease, and, in consideration thereof, defendant was to pay one-third of the expenses of operating it, said expense being limited to the work of three men and necessary cost of supplies for same for the period of work then in contemplation by the parties, to wit, December, 1910, and January, 1911; that, pursuant to said agreement, plaintiff on or about November 30, 1910, delivered an assignment of said one-third interest to the said defendant, defendant agreeing to send a man to represent his share of the work or pay the wages of such a man, and, in addition thereto, he agreed to bear one-third of cost of supplies for three men and certain other necessary expenditures; that defendant's portion of the expenditures was advanced and fixed by plaintiff; that, instead of three men being out on the work, it appears that Girton, who directed the work, employed, including himself and Krabbenhoff, six men or twice what the agreement called for; that defendant had no notice that the additional three men were to be employed; that the work of the six men and the statement of total expenditures made by plaintiff in evidence is correct, and that said work was valuable and benefited all parties, including the defendant; that Krabbenhoff, prior to commencement of this action, had duly assigned

Statement of Facts

to plaintiff all his interest in the demand sued for. That defendant had a right to withdraw from his venture at any time, thereby releasing himself from liability for subsequent expenditures; that the total expense of supplies, assaying, and the like for said period was \$716.99, and the total amount of wages at \$4 per day for 263 days was \$1,052, making a total of \$1,768.99, from which should be deducted \$336.15 total cost of board for men, leaving \$1,432.84, of which sum, under foregoing facts, defendant agreed to pay one-sixth or \$238.81, and that no part of the same has ever been paid.

"(2) The agreement referred to in finding 1 entered into by the defendant was oral, except as evidenced in document referred to in finding 3, and no written contract or memorandum of any such contract was signed by defendant."

Findings 3, 4, and 5 set out in full the assignment to defendant, the original lease to plaintiff, and the lease or sublease to Krabbenhoff referred to in finding 1.

"(4) On February 6, 1911, defendant delivered to plaintiff the paper referred to in finding No. 3, and at the same time told plaintiff that he did not care to have anything to do with the proposition; and plaintiff has had possession of the said paper ever since. At that time all the work mentioned in finding No. 1 had been done and all the expense therein mentioned had been incurred."

"(7) Defendant has never had any other interest in said lease or the mining ground mentioned therein, except as in these findings mentioned, and the only benefit derived from the work and expense mentioned in these findings by him is by virtue of whatever interest he acquired by the oral agreement mentioned in these findings and the paper set out in finding No. 3.

"(8) The matter of defendant having a right to withdraw from the agreement at any time was never expressly mentioned between the parties."

The document referred to in finding 3 as an assignment to defendant was in the form of a lease or sublease, dated

Argument for Appellant

October 10, 1910, and was signed by the plaintiff and delivered to the defendant, but was never signed by the latter. The lease of the Nevada Silver Bow Mining and Milling Company to the plaintiff, Girton, incorporated in finding 4, contained a provision to the effect that when the lessee shall have done \$700 worth of work on the demised premises during the year 1910, sufficient to hold the claims leased under the provisions of the laws of the United States relative to the performance of annual work on mining claims, then the lease was to be extended for an additional six months or until May 15, 1913. One of the considerations of the lease was that the lessee agreed: "To work said premises and to work the same with at least thirty shifts of eight hours each during each month of the continuation of this lease," etc. It was further covenanted in the lease that "upon the violation by said lessee, or any person under him, of any covenant herein contained, the term of this lease shall, at the option of the lessor, expire and the same and said premises shall become forfeited to said lessor," etc. The lease further specified that it was "for the term beginning on the 15th day of November, 1910, and ending on the 15th day of November, 1912, at noon, unless sooner forfeited or determined by violation of any covenant herein contained."

P. E. Keeler, for Appellant:

All the terms of the original lease and of the assignment or sublease show that it was contemplated that the relations created should exist for the full term of the lease. It is clear that this agreement for a mining partnership "by the terms is not to be performed within one year from the making thereof." (Comp. Laws, 2700.)

A contract of partnership, formed to exist more than one year, must be in writing. (*Morris v. Peckham*, 51 Conn. 128; *Wilson v. Ray*, 13 Ind. 1; *Wahl v. Bernum*, 116 N. Y. 87, 22 N. E. 280.)

Nor is this such a contract as is cured by a part performance. (*Billington v. Cahill*, 51 Hun, 132; *Herrin v. Butters*, 20 Me. 119; *Broadwell v. Getman*, 2 Denio, 87;

Argument for Respondent

Hill v. Hooper, 67 Mass. 131; *Durand v. Curtis*, 57 N. Y. 7; *Board v. Howell*, 21 Ind. App. 495, 52 N. E. 769; *Thisler v. Mackey*, 5 Kan. App. 217, 47 Pac. 175; *Klein v. London and Globe Ins. Co.*, 57 S. W. 250.)

Here there was no special injury to plaintiff by failure of defendant to perform the oral agreement of copartnership, for the reason that plaintiff did no more work and furnished no more supplies than he would have done under his original lease and his arrangement with Krabbenhoff, and for all of the work that he did do he received credit on his original lease. (*Johnson v. Upper*, 38 Wash. 693, 80 Pac. 801.)

Even where there has been a part performance, the complaint must be framed on the implied contract, alleging the reasonable value of the labor or materials. (*De Bord v. Holcomb*, 13 Colo. App. 161, 57 Pac. 548; *Jarboe v. Severn*, 85 Ind. 496; *Dowling v. McKenney*, 124 Mass. 478.)

Where the complaint is framed on the invalid express contract, there can be no recovery upon the theory of implied contract for reasonable value. (*Gazzam v. Simpson*, 114 Fed. 71; *Hillhouse v. Jennings*, 60 S. C. 373, 38 S. E. 599; *Miller v. Wisener*, 45 W. Va. 59, 30 S. E. 237; *Dunphy v. Ryan*, 116 U. S. 491.)

The recovery under such circumstances must be for some benefit shown by the evidence to have been actually received by the defendant, and not for the damage or injury suffered by the plaintiff on account of the refusal of the defendant to comply with the void agreement. (*Dowling v. McKenney*, 124 Mass. 478; *Browne*, Stat. Frauds, 5th ed. par. 118a; *Gazzam v. Simpson*, 114 Fed. 71.)

McIntosh & Cooke, for Respondent:

It was a mere agreement of mining partnership, the subject-matter being mining claims on which plaintiff had a lease. The fact that plaintiff has a lease for a period of two years or ten years is wholly immaterial. He could agree to form a mining partnership to continue

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for a month or a year or for no definite time. The court found as a fact that defendant could withdraw at any time. In order to be within the statute the contract must be one which cannot possibly be performed within a year. (29 Am. & Eng. Ency. Law, 941, 942, note; 20 Cyc. 203, note 19.)

The agreement of partnership from and on which the liability sued upon arises, being terminable at any time, it is not a contract that could not possibly be performed within a year. (29 Am. & Eng. Ency. Law, 942, notes; 20 Cyc. 204, notes 26-28.)

The statute only includes agreements "that by the terms," *i. e.*, by the express provisions in the contract itself, are not to be performed in a year. The lease from owners of claims to Girton conveyed to him an interest which could be made the subject of an independent contract by him with others. He made such independent contract, but this contract did not "by its terms" provide that the relation should continue any fixed time, and besides the court found as a fact that Daniels could terminate the contract at any time he wanted to. (Comp. Laws, 2700; 29 Am. & Eng. Ency. Law, 947, 948, note 1.)

But if it should be held that the contract was within the statute, the fact that plaintiff performed labor and expended money on the faith of defendant's oral promise is sufficient to entitle plaintiff to recover such amount on *quantum meruit*. (*Swift v. Swift*, 26 Cal. 266; 20 Cyc. 299, notes 45-47; 29 Am. & Eng. Ency. Law, 823, note 5, p. 839; 9 Ency. Pl. & Pr. 717.)

By the Court, NORCROSS, J., after stating the facts:

Two questions of law are presented upon the appeal in this case. It is the contention of the appellant that the judgment is not supported by the findings for the following reasons:

First, that the contract was void under the statute of frauds, it being an oral contract which by its terms was not to be performed within one year.

Second, it was an oral executory contract and there was no part performance sufficient to bind the defendant, the

work performed by the plaintiff being of no benefit to the defendant.

[1] The work for which the defendant was held liable for a one-third part appears to have been done in pursuance of that provision of the original lease relative to the annual work for the year 1910 on the seven demised claims. This work was optional under the provisions of the lease, and to be effective had to be begun during the month of December, 1910, and prosecuted without interruption until completed. The agreement to do this work may, we think, be regarded as an independent agreement to do a certain character of work which was contemplated to be completed within a year, and as to such agreement the statute of frauds would not apply.

[2] But, if we consider the terms of the original lease as controlling, we are of the opinion that the agreement is not void under the statute of frauds as an oral agreement by its terms not to be performed within a year. While the lease by its terms, if fully complied with, may have extended for two years and even longer, nevertheless it could have been terminated by act of the parties within a year according to its specific provisions and without violation of its terms.

[3] If the lessee failed to perform the requisite amount of labor monthly, the lease could be terminated by the lessor. The lease in question in this case is a common form of lease of undeveloped lode mining property. The lessor seeks to have his property developed at the expense of the lessee, while the latter assumes the burden of expense of developing the property in the hope of finding a paying mine. As long as the lessee properly performs the required labor, his lease is nonforfeitable. Should he fail to perform the required amount of work, the lease may be terminated at once by the lessor. If, after the performance of a certain amount of labor upon the property, it appears that further expenditures would be useless, without liability to himself, he may, and usually does, abandon or surrender his lease. (27 Cyc. 719.)

Because the finding of ore in paying quantities is usually problematical when mining leases of this kind

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are entered into, in the absence of provisions to the contrary in the lease, it may be considered within the contemplation of the parties that a showing of conditions upon the leased property which would not justify further expenditure upon the part of the lessee will warrant the latter in withdrawing from the lease. As such a showing may be made within the year, the court below did not materially err in finding "that the defendant had a right to withdraw from his venture at any time," even though such right to withdraw from the agreement "was never expressly mentioned between the parties."

[4] It cannot be said, we think, that the defendant is in a position to contend that he received no benefit from the contract. The contract was for the development of mining property, and the work done might have disclosed a mine of great value. If it did, defendant was in a position to reap a proportional part of the reward of such discovery, and it is not to be presumed that any one in such position would then decline to claim the interest which his contract entitled him to. The right which one has to share in the profits of a rich ore body if discovered ought to be deemed a valuable consideration and benefit in mining contracts of this character.

[5] Appellant strenuously contended that he never entered into the contract sued upon. That question having been determined by the trial court on conflicting evidence, its finding is conclusive on this court. The court did not err in its conclusions of law based on its findings of fact.

[6] Even if it could be said that the contract sued upon was within the statute of frauds, the plaintiff, as contended by counsel for respondent, was entitled to recover on a *quantum meruit*. (*Lapham v. Osborne*, 20 Nev. 175; 20 Cyc. 299.) Whether recovery in this case could have been made on a *quantum meruit* without an amendment of the pleadings is, however, a question we have not considered. See *Burgess v. Helm*, 24 Nev. 242.

The judgment is affirmed.

[No. 1984]

H. E. CLARK, RESPONDENT, v. M. MITCHELL, G. E. SHANNON, AND A. A. CARION, APPELLANTS.**1. FRAUDS, STATUTE OF—CONTRACT TO RELOCATE MINING CLAIM.**

An oral agreement between the plaintiff, a part owner of a mining claim, and one defendant, by which the latter was to perform assessment work on the claim for 1909, and plaintiff was to convey to him an undivided one-fourth of the claim, and defendant was also to relocate another claim in the joint names of plaintiff and defendant in consideration of plaintiff's refraining from performing assessment work on the claim, is not void under Rev. Laws, 1069, providing that no interest in lands shall hereafter be created, granted, or assigned unless by act or operation of law, or by deed of conveyance in writing.

2. MINES AND MINERALS—AGREEMENT TO RELOCATE MINING CLAIM—FAILURE TO PERFORM AGREEMENT.

Where there is an oral agreement between plaintiff, a part owner of a mining claim, and one defendant, by which the latter was to perform the assessment work on the claim for 1909, and plaintiff was to convey to him an undivided one-fourth of the claim, and defendant was also to relocate another claim in the joint names of plaintiff and defendant in consideration of plaintiff's refraining from performing assessment work on the claim, a trust relation is created, and if defendant fails to perform the assessment work, and the first claim reverts to the public, and in relocating the second one he does not include plaintiff as one of the relocators, plaintiff can enforce the trust and recover the share which he would have received had the defendant performed the contract.

3. MINES AND MINERALS—AGREEMENT TO RELOCATE MINING CLAIM—ESTOPPEL TO DENY RIGHTS IN CLAIM.

Where under an agreement by defendant with plaintiff to relocate a mining claim in their joint names, defendant relocates the claim but omits plaintiff's name, defendant, in an action by plaintiff to recover his share of the claim under the agreement, is estopped to deny plaintiff's rights in the claim and cannot question the validity of the location.

APPEAL from the Seventh Judicial District Court, Esmeralda County; *Peter J. Somers*, Judge.

Action by H. E. Clark against M. Mitchell and others. Judgment for plaintiff, and defendants appeal. **Affirmed.** Petition for rehearing. **Denied.**

The facts sufficiently appear in the opinion.

Thompson, Morehouse & Thompson, for Appellants:

The contract, as testified to by Clark between himself and Mitchell, whereby the latter agreed to do the annual

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labor on the Silver King Fraction claim in consideration of Clark deeding to him half of his (Clark's) interest, is a nullity, because within the statute of frauds. (*Arnold v. Goldfield Third Chance M. Co.*, 32 Nev. 447; *Mane v. Howerstag*, 109 Cal. 122; *Comp. Laws*, 2694; *Wardell v. Williams*, 62 Mich. 50; *Chamberlain v. Dow*, 10 Mich. 219; *Seymour v. Cushway*, 100 Wis. 580; *Feeney v. Howard*, 79 Cal. 525; *Levy v. Brush*, 45 N. Y. 589; *King v. Upper*, 106 Pac. 612; *Frits v. Mills*, 106 Pac. 725; *De Barski v. Paige*, 36 N. Y. 537; *Franklin v. Matca M. Co.*, 158 Fed. 941.)

The contract to do the work on the Silver King Fraction was separate and independent and had nothing to do with the agreement to relocate the Whirlwind No. 4. Assuming what we do not admit to be the fact, that Mitchell agreed with Clark that he would relocate the Whirlwind No. 4 in his and Clark's names, and that they should be joint owners, half and half, and that in violation of such agreement Mitchell located the claim in his own name and that of Carion and Shannon, Clark could have no interest or action in the relocated claim. Clark must have parted with something, paid something, or done something.

There was no trust relation. They simply made an oral contract, and Mitchell violated his oral agreement, broke his word. To constitute a trust or confidential relation, there must have been some such relation, arising outside of the contract itself, and existing between the parties. The contract does not create the relation. (*Taylor v. Kelly*, 37 Pac. 216; *Doyle v. Murphy*, 22 Ill. 508; *Wier v. Gard*, 88 Ill. 493; *Hodgson v. Fowler*, 43 Pac. 462; *Duffy v. Masterson*, 44 N. Y. 557; 1 *Perry on Trusts*, sec. 134; *Kroft v. Smith*, 117 Pac. 183; *Wheeler v. Reynolds*, 66 N. Y. 234; 3 *Pom. Eq. Juris.* sec. 1056.)

The verbal promise does not create a trust. The party claiming the trust expended nothing, therefore he has no equitable estate. (*Cushing v. Houston*, 102 Pac. 29; *Clallam v. Jackson*, 101 Pac. 832; *Howland v. Blake*, 97 U. S. 624.) These cases are not based on the statute of frauds, but upon the proposition that a mere verbal agreement does

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not and cannot create a trust. A trust presupposes some title, legal or equitable, of which the party claiming the trust is deprived.

A person cannot locate in one claim two or more noncontiguous tracts of land. (16 L. D. 186; 13 L. D. 146; 1 Lindley on Mines, 1st ed. sec. 338.)

Finding No. 4 is not sustained by the evidence, for the court therein makes the agreement to do the labor on the Silver King Fraction and the relocation of the Whirlwind No. 4 both one and the same contract.

Finding No. 7 is not supported by the evidence, unless one wholly misconstrues the certificates of location of the Whirlwind No. 4 and of the Silver King Fraction. (Morrison's Mining Rights, 14th ed. p. 65; *Brook v. Justice M. Co.*, 58 Fed. 106; *Gibson v. Hjul*, 32 Nev. 360.)

Finding No. 8 has no foundation in law or in fact. Shannon and Carion knew nothing of any agreement to relocate the Whirlwind between Mitchell and Clark, and there is no testimony to that effect. On the contrary, the evidence is without contradiction that long prior to the Mitchell-Clark agreement, Shannon, Carion and Mitchell had agreed as to such relocation. There is no law that can hold Shannon and Carion as trustees for Clark. A third person cannot be bound by the act of an agent, when he does not know that there is an agency of any kind. (Am. & Eng. Ency. Law, 1136; Note by Freeman to 88 Am. St. Rep. 782-786.)

To give Clark any right in the premises, we must set aside Mitchell's agreement with Shannon and Carion, and substitute in place of it a subsequent agreement with Clark, of which neither Shannon or Carion had knowledge.

If it be claimed Clark waived his right to locate, we say he gave Mitchell nothing, because Mitchell had the absolute right to locate. To be a consideration, Clark must have had a sole or superior right to Mitchell.

On Petition for Rehearing: The court overlooks the undisputed fact in this case that Mitchell had a prior agreement concerning the relocation of the Whirlwind

Argument for Respondent

No. 4 with Shannon and Carion. It is not law that the act of Mitchell would bind any interest of Shannon and Carion.

The district court found as a fact that plaintiff was fully and fairly informed by others. Under these circumstances, considering the uncertain value of the property, plaintiff should have promptly asserted his rights, and not have waited until the defendant had developed the property and demonstrated its value. (*Mackenzie v. Coslett*, 28 Nev. 65; *Gamble v. Silver Peak*, 34 Nev. 428.)

Frank J. Hangs, for Respondent:

The deception and fraud of Mitchell operated to raise a constructive trust in favor of Clark. (*Bowler v. Curler*, 21 Nev. 158; *Levy v. Ryland*, 32 Nev. 460; *Thompson v. Thompson*, 54 S. W. 145.)

This agreement was not within the statute of frauds and that statute cannot be invoked to protect a fraud or aid in a fraud.

There was mutuality of contract between Clark and Mitchell, and Mitchell could have obtained relief had he honestly and faithfully performed his contract and Clark had then tried to evade carrying out his part. (*Musick Oil Co. v. Chandler*, 109 Pac. 163.)

The pointing out of the claim and the forbearing and waiving his right to locate the claim for himself is a good and sufficient consideration. (*Ballard v. Burton*, 24 Atl. 769; *Bank v. Nelson*, 111 Pac. 913; 9 Cyc. 311; *Trice v. Comstock*, 121 Fed. 620; *Brooks v. Bertners*, 96 N. W. 97; *Sanguinetti v. Rossen*, 107 Pac. 560; *Harris v. Harris*, 110 Pac. 1085; *Eisenberg v. Goldsmith*, 113 Pac. 1127; *Pomeroy*, Eq. Juris. 3d ed. secs. 899, 918, 959, 1044, 1050.)

The doctrine we are contending for has been applied in a number of cases relating to mining property. (*Jurst v. Patchin*, 35 Fed. 816; *Lockhart v. Rollins*, 21 Pac. 413; *Utah M. Co. v. Dickert*, 21 Pac. 1002; *Sun Dance M. Co. v. Frost*, 64 Pac. 435; *O'Neill v. Otero*, 113 Pac. 614; *Murley v. Ennis*, 2 Colo. 300; *Moritz v. Laville*, 77 Cal. 10; *Argentine M. Co. v. Benedict*, 55 Pac. 559.)

The agreement with reference to the work on the Silver King Fraction and the agreement to relocate the Whirlwind No. 4 were but two parts of what is only a single agreement.

Whatever title or interest Carion and Shannon may have in the Helen came from Mitchell, and that title and interest is impressed with the constructive trust in favor of Clark.

By the Court, TALBOT, C. J.:

This is an action brought by the respondent to obtain a judgment declaring him to be the owner and to have possession of an undivided one-half interest in a certain mining claim named the Helen, situate in Hornsilver mining district, Esmeralda County. The court found the following facts substantially in accordance with the allegations of the complaint, and as a conclusion of law therefrom determined the plaintiff to be entitled to judgment as prayed for:

"(1) That at all times hereinafter mentioned and until midnight of the 31st of December, 1909, J. M. Russell, Howard Russell, and Elmer J. Chute were the owners of the Whirlwind No. 4 lode mining claim, situate in Hornsilver mining district, Esmeralda County, Nevada.

"(2) That at the time of the making of the contract hereinafter mentioned, plaintiff Clark and Mr. E. L. Stingley were the owners of the Silver King Fraction lode mining claim, situate in the above-mentioned district, county and state, and lying adjacent to and contiguous with said Whirlwind No. 4 lode mining claim.

"(3) That at the time of the making of said contract plaintiff had the right, by virtue of an agreement with said Elmer J. Chute, to enter upon said Whirlwind No. 4 lode mining claim in the place of said Chute and perform the assessment work thereon for the year 1909, and thereby acquire the interest of said Chute in said claim.

"(4) That between the 23d and 29th days of December, 1909, inclusive, plaintiff and defendant Mitchell entered into a contract, not in writing, whereby defendant

Mitchell agreed to perform the assessment work upon the said Silver King Fraction for the year 1909, in consideration whereof plaintiff agreed to convey to him, said Mitchell, the undivided one-fourth of said claim; and whereby defendant Mitchell agreed to relocate said Whirlwind No. 4 in the joint names of plaintiff and said Mitchell, each to have one-half thereof, in consideration whereof plaintiff agreed to refrain from performing the assessment work for the year 1909 upon said Whirlwind No. 4, and permit the same to revert to the public domain so as to make the relocation thereof as aforesaid possible.

"(5) That the terms and conditions of said contract were fully kept and performed on plaintiff's part, but defendant Mitchell, contrary to the terms of said contract on his part to be kept and performed, and with the fraudulent purpose of dispossessing the plaintiff of said ground, wilfully failed to perform the assessment work upon said Silver King Fraction for the year 1909, and because of such failure the same reverted to the public domain and was lost to plaintiff and said Mitchell in relocating said Whirlwind No. 4 as the Helen lode mining claim, as by the pleadings established, omitted to include plaintiff as one of the relocators thereof, and in violation of the faith and confidence reposed in him by plaintiff, and with the fraudulent purpose aforesaid, relocated said premises in the sole names of himself and defendants Shannon and Carion.

"(6) That the plaintiff wholly relied upon defendant Mitchell's promise to perform said assessment work upon said Silver King Fraction lode mining claim and to relocate said Whirlwind No. 4 as aforesaid, and, because of his faith in and reliance upon said Mitchell to perform his part of said contract, refrained from performing said assessment work and making said relocation.

"(7) That the said Helen lode mining claim laps over, upon, and includes part of the territory comprising the said Silver King Fraction lode mining claim, and the area so overlapping said Silver King Fraction contains the principal discovery of said Helen lode mining claim, and

from it defendants have extracted large quantities of mineral-bearing rock and quartz of commercial value.

"(8) That defendants Shannon and Carion acquired their respective interests in said Helen lode mining claim only by virtue of the relocation made by the defendant Mitchell, as aforesaid in violation of the contract with and trust and confidence reposed in him by plaintiff Clark as above set forth. That said defendants did not purchase said interests for value or otherwise or acquire the same in good faith or without notice of plaintiff's rights in the premises, but took the same with full notice of all of the foregoing facts."

This case was argued and submitted to this court, together with Case No. 1987—H. E. Clark and E. L. Stingley against the same defendants (35 Nev. 464, *post*), appellants herein. The two cases are so related that they will be considered together. The latter action was brought by Clark and Stingley to recover judgment for the possession of an undivided three-fourths interest of a certain described piece of ground alleged to be a part of the Silver King lode mining claim, included between the exterior boundaries of the said Helen lode mining claim involved in Case No. 1984, *supra*. In the latter case the findings and decision of the court were as follows:

"That said location of the Silver King Fraction lode mining claim was made for the purpose of claiming a certain piece of vacant ground lying between the Deyling claim, near the westerly end thereof, and the Lime Point No. 3 claim, near its easterly end line; also extending northerly between the end lines of the Deyling claim and the Lime Point No. 1 claim, to a point about 350 or 375 feet northerly from the southwest corner of the Deyling claim and the Lime Point claim No. 1, to a point where said end lines intersect and cross each other. The plaintiffs also, by virtue of said location, claim the piece of ground described as adjoining the west end of what was known as the Whirlwind No. 4 lode mining claim, lying about 250 feet northerly from the northerly point of the

fractions above described. The location monument of the said Silver King Fraction was placed upon the vacant ground sought to be located, about 75 feet north of the southwest corners of the Deyling and Lime Point No. 1 claims, and the discovery work was done about 150 feet northerly from the location monument.

"That on the 23d day of December, 1909, the plaintiff H. E. Clark made an agreement with the defendant M. Mitchell to perform the annual labor upon the Silver King Fraction lode mining claim, for an undivided one-fourth interest in the same. In compliance with said contract, the defendant Mitchell did, or caused to be done, some work upon the ground claimed by the plaintiff as the Silver King Fraction. The evidence fails to show, however, that a sufficient amount of work was done by the defendant Mitchell to meet the requirements of the law relative to the annual labor upon mining claims.

"That the defendant A. A. Carion had knowledge of the agreement which had been made between the plaintiff Clark and the defendant Mitchell; but there is no evidence which, in my judgment, was sufficient to show that the defendant G. N. Shannon had any knowledge of the agreement made between the plaintiff, Clark, and the defendant Mitchell.

"That on the 1st day of January, 1910, the defendants Mitchell, Shannon, and Carion located the Helen lode mining claim, taking in the ground which had, prior to that time, been claimed as the Whirlwind No. 4 lode mining claim, and also including the ground first above described, and which was claimed by the plaintiff to be a part and portion of the Silver King Fraction mining claim.

"It is claimed by the plaintiffs that the defendants, in view of the agreement above mentioned, were occupying a fiduciary relation to and with the plaintiffs, and that they could not occupy and claim any portion of the ground claimed by the plaintiffs as the Silver King Fraction, to the exclusion of the plaintiffs, and to deprive them of their rights and interest in said ground as a portion of the Silver King Fraction mining claim.

"As conclusions of law, I find that a fiduciary relation did exist between the plaintiffs and the defendants Mitchell and Carion, and that the plaintiffs should be entitled to recover an undivided three-fourths interest in any property which the defendant located, as against the defendants Mitchell and Carion, provided that any portion of the ground so located by them as the Helen claim shall be found to be a portion of the Silver King Fraction claim, lawfully claimed and held by the plaintiffs herein. The evidence relative to the amount of ground alleged to have been vacant at the westerly end line of the Whirlwind No. 4 is very conflicting, but, with the views entertained by the court as to the law of this case, it will not be necessary to reconcile the conflicting evidence, nor to pass upon the amount of ground which was included in that fraction. From the facts above found, the conclusion of the court is that the plaintiffs acquired no rights to that vacant fraction of ground lying west of the Whirlwind No. 4 lode mining claim, by virtue of the location of the Silver King Fraction. This last-mentioned fraction was not contiguous to the fraction upon which the location was made and the discovery work performed, and was situated at least 250 feet away from the nearest point of the located fraction, and it was an attempt on the part of the plaintiffs to include in their location two several and distinct pieces of ground, separated from each other by a distance of at least 250 feet covered by other and prior located claims.

"It does not appear that any location work was done upon the premises in controversy. No location notice and no monuments were erected anywhere in the vicinity of this fraction to indicate that any claim whatever was made for that fraction. In fact, it appears from the evidence that all of the boundary monuments of the so-called Silver King Fraction lode were placed upon prior and existing mining claims and at a considerable distance from the fractions which were open to location, and were sought to be claimed as the Silver King Fraction. Mr. Lindley, in discussing this proposition, uses the following language: 'If the lode of the junior

locator on his course reaches or crosses the properly established surface boundaries of a prior location, the right to pursue the vein beyond that point cannot be asserted. The end line of the junior must either conform to the cross boundary of the senior, or he must, at the expense of abandoning a portion of the lode, so construct his end lines that no part of them shall be on territory previously appropriated.' No case has been tried by me in which the same questions have been presented as those that are involved in this case, and no authorities have been cited upon the points involved, but it is unquestionably the law that no two separate mining claims can be held by one location. It would seem equally true and logical that no two separate fractions of ground could be held by one location.

"If my conclusions are correct in this respect it follows that the defendants in locating the Helen lode mining claim did not in any manner encroach upon the legal rights of the plaintiffs. The complaint of the plaintiffs should be dismissed, and the defendants have judgment for their costs herein expended, and it is ordered that judgment be entered accordingly."

Case No. 1984 was tried before Judge Somers, while Case No. 1987 was tried by Judge Stevens.

On behalf of the defendants it is contended that the oral agreement made between Clark and Mitchell was void under the statute of frauds; that the Silver King Fraction, being in two pieces, which were divided by other mining locations, only the piece having the location point can be held, and that the other piece, in which is included the valuable ground in controversy on the Whirlwind No. 4, relocated as the Helen, is not a valid part of the Silver King Fraction.

[1] We are unable to agree with the contention that the contract between Clark and Mitchell was void because not in writing, under section 1069, Revised Laws, which provides: "No estate, or interest in lands, other than for leases for a term not exceeding one year, nor any trust or power over or concerning lands, or in any manner

relating thereto, shall hereafter be created, granted, assigned, surrendered, or declared, unless by act or operation of law, or by deed or conveyance, in writing, subscribed by the party creating, granting, assigning, surrendering, or declaring the same, or by his lawful agent thereunto authorized in writing." This statute was intended to prevent, and was never designed to encourage, fraud. The agreement, supplemented by the conduct of the parties, makes the case very different from one involving only the right to recover on an unwritten agreement for the sale of real estate, for here a fiduciary relation was created by reason of which Clark trusted and delegated Mitchell to protect Clark's interests. If it had been merely an oral agreement to sell or exchange mining property or other real estate, and Mitchell had declined to perform, the contract would not be enforceable. In such a case Clark would not have lost, nor Mitchell acquired, the title. The evidence and findings indicate that, if the agreement had not been made, Clark would have done the annual assessment work to prevent forfeiture of the Silver King Fraction and would have gone out himself and relocated the Whirlwind No. 4.

[2] In answer to the contention that Clark paid or gave nothing as a consideration, it is sufficient to say that by the oral agreement of Mitchell to do the work on the Silver King Fraction for a one-quarter interest, and to relocate the Whirlwind No. 4 for himself and Clark, and by his starting the work and representing that he was doing it, Clark was prevented from doing or having the work done and from going out to make the relocation himself, and unless protected by the court lost the ground by reason of Mitchell's failure to do the work and make the relocation for himself and Clark. Under these circumstances, it would be inequitable to allow Mitchell to take advantage of his own wrong and retain for himself and others, and cause Clark to lose, the title which Clark had or would have acquired and retained if Mitchell had not made and broken the agreement to

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protect Clark's interests, and lulled Clark into believing that the work would be and was being done. There was a trust relation, and quite as much obligation and reliance upon Mitchell for the doing of the annual work and the making of the relocation as if he had been employed as an ordinary agent or had been a coowner in the Silver King Fraction. Under the conditions shown, by operation of law the interest in the locations agreed to be acquired and held for Clark belong to him in trust, and he is as much entitled to them as he would have been if Mitchell had done the assessment work and made the relocation with Clark's name.

In the case of *Hunt v. Patchin*, 35 Fed. 816, there were three owners as tenants in common of three mining claims, and by failure to do the annual work there was a forfeiture. The relocation by one of the owners was adjudged to be in trust for the others. In the course of the opinion, Judge Sawyer said: "I am entirely satisfied that these claims were relocated under the new names at the time for the benefit of all the original owners, or else they were located in bad faith by defendant, after giving his associates, by his conduct, the right to believe, and when they did believe, that the location was for the benefit of all. Under this state of facts, I am clearly of the opinion that a trust arises in favor of complainant under the operation of law. * * * It was his duty not to permit a forfeiture for the purpose of relocating and acquiring the whole for himself without their knowledge and consent. By conferring with them and arranging to forfeit, and relocate for the benefit of all, he misled them, and violated the confidence reposed in him, if he relocated clandestinely for the benefit of himself alone. By his act and this breach of faith he threw his associates off their guard and prevented them from taking other means to protect their interests. * * * In *Lakin v. Mining Co.*, 11 Sawy. 238, 25 Fed. 337, a case similar, but not exactly like this, it was held that 'where one party, wrongfully, obtains the legal title to land, which in equity and good conscience belongs to another, whether

he acts in good faith, or otherwise, he will be charged in equity as a constructive trustee of the equitable owner.' Can it be doubted, on the facts as they appear in the pleadings and evidence, that defendant got whatever title he has to the interest of complainant and James in the mines in question through a breach of faith and confidence? It seems to me not. He must therefore be charged as trustee of their interests."

In the case of *Royston v. Miller*, 76 Fed. 50, involving the Kingston mines in Lander County, Judge Hawley held that a coowner who undertakes to do the work necessary to hold mining claims cannot acquire any interest in them as against his coowners because of the failure to do such work.

In *Reagan v. McKibben*, 11 S. D. 270, 76 N. W. 943, it was held that an agreement to locate a mining claim for the benefit of others is valid although not in writing.

In *Book v. Justice Mining Co.*, 58 Fed. 108, the locating of claims at Virginia City by individuals in their own names and the doing of the annual assessment work thereon for a corporation was held to be for the benefit of the corporation.

In the case of *Trice v. Comstock*, before the Circuit Court of Appeals, 121 Fed. 622, 57 C. C. A. 648, 61 L. R. A. 176, it is said in the opinion: "For reasons of public policy, founded in a profound knowledge of human intellect and of the motives that inspire the actions of men, the law peremptorily forbids every one who, in a fiduciary relation, has acquired information concerning or interest in the business or property of his correlate, from using that knowledge or interest to prevent the latter from accomplishing the purpose of the relation. If one ignores or violates this prohibition, the law charges the interest or the property which he acquires in this way with a trust for the benefit of the other party to the relation, at the option of the latter, while it denies to the former all commission or compensation for his services. * * * And, within the prohibition of this rule of law, every relation in which the duty of fidelity to each other is imposed

upon the parties by established rules of law is a relation of trust and confidence. The relation of trustee and *cestui que trust*, principal and agent, client and attorney, employer and an employee, who through the employment gains either an interest in or a knowledge of the property or business of his master, are striking and familiar illustrations of the relation. From the agreement which underlies, and conditions these fiduciary relations, the law both implies a contract and imposes a duty that the servant shall be faithful to his master, the attorney to his client, the agent to his principal, the trustee to his *cestui que trust*, that each shall work and act with an eye single to the interest of his correlate, and that no one of them shall use the interest or knowledge which he acquires through the relation so as to defeat or hinder the other party to it in accomplishing any of the purposes for which it was created. (2 Sugden on Vendors, 8th Am. ed. 406-409; Mechem on Agency, pp. 455, 456; *Tisdale v. Tisdale*, 2 Sneed, 596, 608, 64 Am. Dec. 775; *Ringo v. Binns*, 10 Pet. 269, 280, 9 L. Ed. 420; *McKinley v. Williams*, 74 Fed. 94, 95, 20 C. C. A. 312, 313; *Lamb v. Evans*, 1 Chan. Div. 218, 226, 236; *Connecticut Mutual Life Insurance Co. v. Smith*, 117 Mo. 261, 295, 22 S. W. 623, 38 Am. St. Rep. 656; *Van Epps v. Van Epps*, 9 Paige, 237, 241; 1 Lewin on Trusts, 246, 180; *Davis v. Hamlin*, 108 Ill. 39, 49, 48 Am. Rep. 541; *Winn v. Dillon*, 27 Miss. 494, 497; *People v. Township Board*, 11 Mich. 222, 225; *Grumley v. Webb*, 44 Mo. 444, 454, 10 Am. Dec. 304; *Lockhart v. Rollins*, 2 Idaho, 503, 511, 21 Pac. 413; *Eoff v. Irvine*, 108 Mo. 378, 383, 18 S. W. 907, 32 Am. St. Rep. 609; *Robb v. Green*, 2 Q. B. 315, 317, 318, 319, 320; *Louis v. Smellie*, 73 Law Times, 226, 228; *Gardner v. Ogden*, 22 N. Y. 327, 343, 350, 78 Am. Dec. 192.)"

[3] Extensive consideration is given in the briefs as to whether under conflicting or later decisions two non-contiguous pieces of ground, separated by prior claims, may be held under one location, and as to boundaries, and whether the monuments or distances control. As

under the agreement Mitchell was the trusted agent or representative of Clark, for the doing of the work on the Silver King Fraction and for relocating the Whirlwind No. 4, and Mitchell was in duty bound to protect Clark to the extent of the interests agreed upon in the Silver King Fraction and in the relocation of the Whirlwind No. 4, Mitchell as a tenant in common is estopped from denying the rights of Clark in the claims, as recognized by their agreement. Whether the relocation made by Mitchell contains more or less ground, and whether the Silver King Fraction may hold a piece of land segregated from its location point, are not questions properly in issue in these cases. These parties being in equity tenants in common, whatever rights Mitchell acquired by location or by possession, or otherwise, in the ground, would inure to the benefit of Clark to the extent of the undivided interest to which he is entitled. Whether one or more of the locations are valid or subsequent to others is not material. The undivided interests of Clark and Mitchell stand on a common basis, differently than if a stranger were seeking to recover the land on the claim that their location was void and that he had made the first valid one.

In *Trice v. Comstock*, *supra*, the court said: "It is here contended that no trust arose because Trice and Beamer had no interest in or control over the lands. But no interest or control of the property to which the agency relates is essential to the raising of the trust. The fiduciary relation and a breach of the duty it imposes are sufficient in themselves. (*Winn v. Dillon*, 27 Mass. 494, 497; *People v. Township Board*, 11 Mich. 222, 225; *Grumley v. Webb*, 44 Mo. 444, 454, 10 Am. Dec. 304; *Lockhart v. Rollins*, 2 Idaho, 503, 511, 21 Pac. 413.) If one employs and pays an agent to investigate the title or the character of land for the purpose of purchasing it, and the agent uses the knowledge he acquires in this way to forestall his principal and obtain a title to the property for himself, it is no answer to the suit of the former to

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recover the land from his agent that the employer never had any title or interest in it, or that he was not injured by the action of the agent.”

In this case, of Clark alone against the defendants, the judgment will be affirmed.

A different order will be made in the other case.

NORCROSS, J.: I concur.

ON PETITION FOR REHEARING

By the Court, TALBOT, C. J.:

Under the cases considered in our decision in *H. E. Clark and E. L. Stingley v. Mitchell, et al.* (see Case No. 1987, page 464 of this volume, *post*), and under *O'Neill v. Otero*, 15 N. M. 707, 113 Pac. 614, and cases cited there and in the brief, we adhere to the conclusion that Clark is entitled to relief under the agreement of Mitchell to relocate the Whirlwind No. 4 and to put Clark in such relocation for an undivided half interest.

However, we notice more particularly one point raised in the petition for rehearing. It is said therein: “Now, it may be true that the act of Mitchell with Mr. Clark would be binding on Mitchell as to any interest that Mitchell might acquire in the property; but we are asserting with great earnestness that it is not law that the act of Mitchell would bind any interest of Shannon and Carion, because the contract made by Clark with Mitchell would be a fraud and a breach of faith against Shannon and Carion, and it does not matter that Shannon and Carion may have known of such an agreement between Clark and Mitchell, because they had a right to presume that Mr. Mitchell would carry out his agreement with them, and he did carry out that agreement, and relocated the mining claim Whirlwind No. 4 according to his previous and prior agreement.”

There is evidence that Mitchell did agree with Carion to relocate the Whirlwind No. 4 for the benefit of Mitchell and Carion, and that Shannon was not aware that he was to be included in the relocation until after it had been made and his name added to the notice. Under these

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circumstances, it may be answered that this is an action by Clark to recover under an agreement made with Mitchell, that no issue is presented as to the interest which Carion might be entitled to recover under any agreement made by him with Mitchell, and that Mitchell could not avoid responsibility for his agreement with Clark by making the relocation in the name of Mitchell and Shannon or others. If by using other names in making the relocation Mitchell could avoid liability on his agreement with Clark, or reduce the share to which Clark was entitled, he could deprive Clark of all but an infinitesimal fraction by adding numerous names to the certificate of location, notwithstanding his agreement to allow Clark one-half of the relocation.

As counsel contend with so much assurance, we state that under the circumstances shown equity will not allow a party to avoid responsibility for his agreement by giving away the property, or by taking it in his own name or in the name of others. If, in addition to making the agreement with Clark, and also an agreement with Carion to relocate each for one-half or the whole of the Whirlwind No. 4, Mitchell had also made an agreement to relocate Carion or others for one-half or the whole of the claim, so that different parties would be entitled under the different agreements to more than the whole interest in the property, we can see how equity might of necessity make some division of the property which would award each of the parties entitled a less proportion than that provided for in his agreement, but the largest proportion possible upon a division of the whole property.

The judgment of the district court awarding Clark an undivided one-half interest in the Helen location will stand, subject to the judgment in the other case, of H. E. Clark and E. L. Stingley against these defendants, or, with the same result, the judgment may be modified to cover all that part of the Helen claim excepting the ground which belonged to the Silver King Fraction at the end of the year 1909. The interest in the ground which so belonged to the Silver King Fraction must be

Points decided

controlled by the judgment in the other case, to which Stingley is a party, as we have indicated in the opinion on petition for rehearing this day filed in that case.

The petition for rehearing is denied.

NORCROSS, J.: I concur.

MCCARRAN, J., having become a member of the court after the argument and submission of the case, did not participate in the foregoing opinions.

[No. 1987]

**H. E. CLARK AND E. L. STINGLEY, APPELLANTS,
v. M. MITCHELL, G. E. SHANNON, AND A. A.
CARION, RESPONDENTS.**

1. MINES AND MINERALS—AGREEMENT TO RELOCATE MINING CLAIM—FAILURE TO PERFORM AGREEMENT.

Where a plaintiff, one of two coowners and locators of a mining claim, contracted with a defendant, whereby such defendant agreed to do the annual assessment work on the claim for the year 1909, and thus prevent a forfeiture, a trust relation was created; and when such defendant, in violation of his agreement, failed to do the work, and permitted a forfeiture, and then relocated the claim in the names of himself and two others, not including plaintiffs, plaintiffs could recover the relocated claim.

2. PRINCIPAL AND AGENT—RELOCATION OF CLAIM—EFFECT OF NOTICE TO AGENT.

Under an agreement between plaintiff and defendant M., by which the latter was to relocate a mining claim, in their joint names, defendant M. relocated the claim, but omitted plaintiff's name as a locator and included the name of defendant S.: *Held*, that the ignorance of S. as to the agreement will not affect the right of plaintiff to enforce the agreement, as the location was made by M., and notice to an agent is notice to the principal.

3. MINES AND MINERALS—LOCATION OF CLAIM—NONCONTIGUOUS TERRITORY.

The right to extend the lines of a mining claim over and across ground belonging to a prior location, and to hold segregated pieces of ground within the exterior boundaries of the location, not exceeding the maximum area of 1,500 by 600 feet allowed by law, appears to be settled.

Argument for Appellant

4. MINES AND MINERALS—LOCATION CERTIFICATE—CLERICAL ERROR.

The description of a mining claim in a location certificate read: "To SW. corner; thence northerly 500 ft. to N. side center post, 1,350 ft. to place of beginning": *Held*, that the failure to carry the boundary to the northwest corner was an apparent omission or clerical mistake if the claim was properly monumented at that corner.

5. MINES AND MINERALS—LOCATION CERTIFICATE—CLERICAL ERROR.

A location certificate is not required to be strictly exact, and an apparent clerical mistake in describing courses and boundaries will be corrected or ignored.

APPEAL from the Seventh Judicial District Court, Esmeralda County; *Peter J. Somers*, Judge.

Action by H. E. Clark and E. L. Stingley against M. Mitchell and others. Judgment for defendants and plaintiffs appeal. **Reversed**, and judgment rendered. Petition for rehearing. **Denied**.

The facts sufficiently appear in the opinion.

Frank J. Hangs, for Appellant:

Mitchell having obtained his information from Clark and having agreed to perform the annual labor on the Silver King Fraction claim, and after having started to perform such labor and entered into a fiduciary relation with Clark and Stingley, cannot be heard to say that the latter's title was defective and for that reason he took the ground for himself.

Noncontiguous portions of ground may be included in one location. (1 Lindley on Mines, 2d ed. p. 469, and authorities cited; *Empire M. Co. v. Bunker Hill M. Co.*, 121 Fed. 973, 114 Fed. 417; *Davis v. Shepard*, 72 Pac. 57; *State v. Court*, 65 Pac. 1020; *Flynn G. M. Co. v. Murphy*, 109 Pac. 851.)

The evidence is uncontradicted that Shannon and Carion had notice of the agreement between Clark and Mitchell to do the work on the Silver King Fraction. The findings of fact were all in favor of plaintiffs. (*Hurst v. Patchen*, 85 Fed. 816; *Lockhart v. Rollins*, 21 Pac. 413; *Utah M. Co. v. Dickert*, 21 Pac. 1002; *Sun Dance*

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M. Co. v. Frost, 64 Pac. 435; *O'Neill v. Otero*, 113 Pac. 614; *Welland v. Huber*, 8 Nev. 203; *Pomeroy*, Eq. Juris. 3d ed. secs. 899, 918, 959, 1044, 1050.)

Thompson, Morehouse & Thompson, for Respondents:

See extracts from brief in Case No. 1984 (p. 447, *ante*); where points involved in this case are considered.

By the Court, TALBOT, C. J.:

The findings of fact in this action are set out with the findings in the case of *H. E. Clark*, one of the plaintiffs herein, against the same defendants (see page 447, *ante*), in the opinion this day filed in that case, which relates to the same property and agreement. Under the facts and the law as determined in that case, the judgment in this case must be reversed.

The claim and recovery by Clark in that action being for an undivided one-half interest in the Helen mining claim, which was a relocation of the Whirlwind No. 4, and the claim in this action being for an undivided three-fourths interest in the ground within the lines of the Silver King Fraction, and lapped by the Helen, the further question has arisen as to the extent of the recovery in this action. The Helen having been located in the names of the three defendants, instead of in the names of Clark and Mitchell, as agreed by Clark and Mitchell, it is said that there is no evidence in the statement showing that Shannon had any knowledge of the agreement between Clark and Mitchell, and consequently it is argued that Shannon is entitled to hold a one-third interest which could not be affected by the agreement of which he was not aware. If Shannon had made the location for himself, or by an agent who was not aware of the agreement, there might be some force in this contention; but, according to the evidence of Mitchell and Shannon, the location was made by Mitchell, who placed Shannon's name on the location notice, and consequently any rights Shannon obtained in the property were acquired through an agent who had knowledge, binding upon Shannon, that Mitchell

had agreed to do the work on the Silver King Fraction for a one-quarter interest, so as to preserve the rights of Clark and Stingley to the remaining three-quarters interest in that claim. On the theory that notice to the agent is notice to the principal, and the agent being well aware that he had agreed to perform the work to protect from forfeiture the rights of Clark and Stingley, they are entitled to a judgment for an undivided three-fourths interest accordingly.

In remanding a case it is seldom that this court will order the entry of a reverse judgment without a new trial, which should always be allowed when there is any probability that new facts might be established which would materially affect the rights of litigants. After the trials in these two cases, the findings are so well supported by the evidence, and by the testimony of the parties themselves, that we conclude that a new and expensive third trial could not in any way change the result, and would be only an unnecessary expense and hardship. Consequently, the district court is directed to enter a judgment in favor of the plaintiffs for an undivided three-fourths interest in the piece of ground claimed by them which was within the boundaries of the Silver King Fraction, and described or demanded in the complaint. If desired or requested by any of the parties the court may take evidence for the purpose of making a description of this piece of ground more specific in the judgment.

NORCROSS, J.: I concur.

ON PETITION FOR REHEARING

By the Court, TALBOT, C. J.:

This case was considered in connection with the one of H. E. Clark against the same defendants, No. 1984, and the findings and decisions in both cases appear in this volume (pages 447-464 and 464-467). After having given the petitions for rehearing careful consideration, we are still of the opinion that both cases should be remanded, but we will elaborate the decisions reached, and make the

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directions to the district court more specific. We adhere to the conclusion that under the agreement between Clark and Mitchell, by which Mitchell promised to do the assessment work on the Silver King Fraction for a one-quarter interest in that claim, the plaintiffs Clark and Stingley are entitled to hold and recover an undivided three-quarters interest in any ground relocated in the name of the Helen which belonged to the Silver King Fraction at the time that claim was forfeited at the end of the year 1909 by the failure of Mitchell to do the work on the Silver King Fraction claim, as he had agreed. If Mitchell had performed his agreement for doing the work on the Silver King Fraction for that year, and had thereby preserved the claim from forfeiture, the three-quarters interest retained by Clark and Stingley would have continued to exist only in the ground which actually belonged to that location; Stingley would have continued to own his half interest in it, and would have been entitled to no interest in any other ground, as against Mitchell, and Clark would have been entitled to no interest in any other ground as against Mitchell under his agreement to do the assessment work on that claim.

As to the ground embraced in the Silver King Fraction, a fiduciary relation existed between Mitchell and Clark under the agreement of Mitchell to do the assessment work on that location, and incidentally Stingley is entitled to recover his interest in that ground, because he was a coowner with Clark, who had made the agreement with Mitchell for the preservation and to prevent the forfeiture of that claim. A fiduciary relation also existed between Clark and Mitchell in regard to the relocation of the Whirlwind No. 4 as the Helen; but the law imposes no obligation upon Mitchell in favor of Stingley as to any ground excepting that which belonged to the Silver King Fraction, and the fiduciary relation existing between Clark and Mitchell, under the agreement for the doing by Mitchell of the assessment work on the Silver King Fraction was different, and related to different territory, than the fiduciary relation existing between them under

their agreement in regard to the relocation of the Whirlwind No. 4, in which Stingley had no interest.

After agreeing to do the work on the Silver King Fraction, Mitchell became estopped to deny the right of Clark and Stingley to that location as claimed and possessed by them, and he could not, by relocating in the name of himself or others, deprive Clark and Stingley of their interest in that claim, whether the ground was segregated into two pieces by a prior location or not. He is not allowed to blow hot and cold in the same breath, and is estopped from contending that Clark and Stingley had no right to a segregated piece of ground which they claimed and possessed, and to protect which he agreed to do the annual work, and that by a relocation he could hold, not only his own interest, but any right or claim of Clark and Stingley to that part of the location.

As against Clark and Stingley, Carion and Shannon are also without any equity in ground which belonged to the Silver King Fraction, even if it be admitted that the exterior lines of that claim covered at the time of its location two noncontiguous unappropriated pieces of the public domain, for there was no agreement by Mitchell to include Carion in the relocation of ground belonging to the Silver King Fraction, or Shannon in any location, and they were charged with knowledge that Mitchell had agreed to do the work which would prevent a forfeiture and relocation of that claim.

The agreement of Mitchell to put Carion in the relocation of the Whirlwind No. 4 is not regarded as covering any ground which was a part of the Silver King Fraction. The location notice of the Silver King Fraction describes it as lying between the Whirlwind No. 4 and other locations. This notice states: "We claim all unlocated ground within our boundary monuments, which boundaries are marked by four corners and two side centers, consisting of posts four feet high. We claim all ground left within our boundaries when adjoining claims are properly surveyed in accordance with their respective locations."

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Although neither suit is an action to define boundaries, and the principle of estoppel regarding the extent of ground applies to each when considered separately, it is apparent that as between the two cases, and the agreement to do the work on one claim and relocate the other, it is important to determine the boundaries of the territory which belonged to the Silver King Fraction, because Stingley's interest is limited to the ground which belonged to that claim, and Clark is entitled to a proportion of that ground different from his interest in the Helen as a relocation of the Whirlwind No. 4.

As the locators of the Silver King Fraction claimed the Whirlwind No. 4, and under the agreements between Clark and Mitchell for the doing of the assessment work on the Silver King Fraction and the relocation of the Whirlwind No. 4 Stingley is entitled to an interest only in the ground which belonged to the Silver King Fraction, and the other parties are entitled to a different proportionate interest in the Whirlwind territory covered by the Helen as a relocation of the Whirlwind No. 4, and including a part of the ground which belonged to the Silver King Fraction, the district court will determine the extent of the territory which belonged to the Silver King Fraction, if any of the parties deem the conflicting area to be of sufficient value or ask for such determination.

When the district court has awarded to Clark and Stingley an undivided three-quarters interest in the area which belonged to the Silver King Fraction, this ground may be considered as excluded from the judgment in the other action for an undivided one-half interest in favor of Clark in the remaining ground belonging to the Helen location.

In this action the trial court held that, notwithstanding the agreement with Mitchell to do the annual assessment work on the Silver King Fraction, the ground in controversy could not be recovered by the plaintiffs, because it was embraced in a piece of land within the exterior lines of the Silver King Fraction, which by a prior location was segregated from the piece of ground on which the

location notice was posted and the location work done on the Silver King Fraction. In the other action, by the plaintiff Clark against the same defendants, another judge presiding concluded that the end monuments of the Lime Point No. 1 claim, an adjoining location, were over about ninety feet too far on the Silver King Fraction, leaving a continuous strip of land belonging to the Silver King Fraction, and consequently held that claim was not cut into noncontiguous pieces.

It is said in the petition for the rehearing that we ought to determine whether noncontiguous pieces of ground, separated by a senior claim, may be held in one location. Since the decision in the *Del Monte* case, 171 U. S. 55, 18 Sup. Ct. 895, 43 L. Ed. 72, the earlier decisions of the land office in *Bimetallic M. Co.*, 15 Land Dec. Dept. Int. 309, and *Mabel Lode*, 26 Land Dec. Dept. Int. 675, have been overruled by the secretary of the interior. (*Hustler and New Year Lode Claims*, 29 Land Dec. Dept. Int. 668; *Hidee Gold Mining Co.*, 30 Land Dec. Dept. Int. 420.) And for a number of years the land office has been granting patents to noncontiguous pieces of ground embraced in the same claim and separated by a prior location. Under the later rulings of the department and the decisions of the courts, including the ones cited in the brief and by that eminent text-writer, Mr. Lindley, at sections 663 and 663a of the second edition of his work on Mines, the right to extend the lines of a mining location over and across the ground belonging to a prior location, and to hold segregated pieces of ground within the exterior boundaries of the location, not exceeding the maximum area of 1,500 by 600 feet allowed by law, and not conflicting with previously located claims, appears to be settled. (*Crown Point v. Buck*, 38 C. C. A. 281, 97 Fed. 462; *Calhoun M. Co. v. Ajax*, 182 U. S. 499, 21 Sup. Ct. 885, 45 L. Ed. 1200.)

As it will be best to determine in this action the extent of the territory which belonged to the Silver King Fraction, if any of the parties require such determination, we refer to the conclusion of the district court in the

other action "that the call of the location certificate of the Whirlwind No. 4 for 500 feet from the southwest corner to north side center post must be held to control in determining the exterior boundaries of the claim."

This location certificate states that J. M. Russell, Howard Russell, and E. J. Chute have located and claim "1,300 linear feet and horizontal measurement on the Whirlwind No. 4 lode, vein, ledge, or deposit along the vein thereof, with all its dips, angles, and variations as allowed by law, together with 300 feet on the south side and 300 feet on the north side of the middle of said vein at the surface, so far as can be determined from present developments, and all veins, lodes, ledges, or deposits and surface ground within the lines of said claim, 1,000 feet running westerly from the discovery monument, and 300 feet running easterly from the discovery monument; said discovery monument being situate upon said lode, vein, ledge, or deposit, and within the lines of said claim, in Hornsilver mining district, county of Esmeralda, and State of Nevada, described by metes and bounds as follows, to wit: Beginning at corner No. 1, the NE corner; thence southerly 400 ft. to SE cor.; thence westerly 650 ft. to south side center posts, 1,300 ft. to SW corner; thence northerly 500 ft. to N side center post, 1,350 ft. to place of beginning. All corner and side centers are marked with posts and stone monuments, with proper description of corner on each. This claim is joined on the south side by the Deyling claim and on the north side by the Valley View lode claim, and lies about 1,000 ft. south of the Lime Point."

The reading of the certificate convinces us that the failure to carry the boundary to the northwest corner was an omission or clerical mistake, and that the learned district judge followed too literally the words showing this omission, when other words in the certificate indicate an intention by the locators to claim the northwest corner, instead of failing to claim what properly would be the northwest corner of the claim, or failing to claim any ground northwest of the line running from the southwest

corner to the north side center. The call in the earlier part of the certificate for 1,300 linear feet along the vein, "with 300 feet on the south side and 300 feet on the north side of the middle of the vein," and with 1,000 feet running westerly from the discovery monument and 300 feet running easterly from the discovery monument, indicates an intention to claim more in width and length along the vein than would be embraced in the claim if the northwest corner were so eliminated.

After running from corner No. 1, the northeast corner, 400 feet southerly to the southeast corner, the writer of the certificate, in stating "thence westerly 650 feet to the south side center post, 1,300 feet to the southwest corner," evidently intended to describe the south side line as running from the southeast corner westerly 650 feet to the south side center post, and as running from the southeast corner westerly 1,300 feet to the southwest corner, the same as if the certificate had read, "from the southeast corner westerly 650 feet to the south side center post, thence westerly 650 feet to the southwest corner." From the wording it may be assumed that it was intended to use the same method in describing the north side line. The language after the words "southwest corner"—"thence northerly 500 feet to north side center post, 1,350 feet to the place of beginning"—indicates a mistake or omission to mention the northwest corner, because to run directly from the southwest corner to the north side center post would in effect be an impossibility, for the use of the words "north side center post" implies that there is a northwest corner to the west of the north side center post, and if such line were run directly as the boundary of the claim from the southwest corner to the north side center post, that post would become the northwest corner of the claim and could not be a side center post, for a corner post cannot be a side center post. If by omission of the west end line in the description, "northerly" instead of "westerly" was given as the course for the north side line, or "westerly" was used, as in one of the copies

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in the record, the words "thence northerly 500 feet to north side center post, 1,350 feet to place of beginning," indicate an intention, after going 500 feet, to continue in a similar direction 850 feet further, and that it had been intended to run along the north side of the claim to the north side center post, and thence on to the place of beginning at the northeast corner of the claim. This apparent clerical mistake, made by omitting any reference to the northwest corner, should not deprive parties of their rights to valuable property, if the claim was actually located and staked at the northwest corner, as distinguished from the north side center.

We have held in *Ford v. Campbell*, 29 Nev. 578, that the making and recording of a certificate of location of a mining claim are not essential, and in *Gibson v. Hjul*, 32 Nev. 360, that the notice of location of a mining claim is not required to be strictly exact, and that the filing of a defective certificate of location does not invalidate the claim. It is the rule that apparent clerical mistakes or errors in describing courses and boundaries will be corrected or ignored. (*Daniel v. Princeton*, 22 S. W. 324, 15 Ky. L. Rep. 108; *Robertson v. Mooney*, 1 Tex. Civ. App. 379, 21 S. W. 143; *Lane v. Thompson*, 43 N. H. 320; *Lush v. Druse*, 4 Wend. 313; *Johnson v. Simpson*, 36 N. H. 91; *Gleeson v. Martin White M. Co.*, 13 Nev. 468; *Weed v. Abbott*, 51 Vt. 609; *Barnard v. Russell*, 19 Vt. 334; *Cornell v. Green*, 88 Fed. 821.) In the last two cases cited, "north" was read as "south."

The district court is directed to enter judgment in favor of the plaintiffs, Clark and Stingley, for an undivided three-quarters interest in the ground which belonged to the Silver King Fraction at the end of the year 1909, including any extralateral rights connected with that ground. Before entering such judgment, if any of the parties so desire and request, the district court will allow amendment of the pleadings to make the description and any issues relating thereto more definite, and by way of new trial as to any such issue hear evidence regarding the boundaries of the piece of ground to which the Silver

Argument for Appellant

King Fraction was entitled at the end of the year 1909, in order that there may be a more definite description in the judgment.

The petition for rehearing is denied.

NORCROSS, J.: I concur.

MCCARRAN, J., having become a member of the court after the argument and submission of the case, did not participate in the foregoing opinions.

[No. 2005]

STATE OF NEVADA, RESPONDENT, v. UNIVERSITY CLUB (A CORPORATION), APPELLANT.

1. INTOXICATING LIQUORS—LICENSES—SOCIAL CLUB—"BUSINESS."

A *bona fide* social club, which disposes, at its clubhouse, of liquors to members and guests at a fixed charge as an incident to the general purposes of the club, the profit on the sales going to pay the general expenses of the organization, is not required to take out a license by Rev. Laws, 3377-3785, approved March 15, 1905, which provides for a license upon the business of disposing of intoxicating liquors; the term "business" in such statute meaning business in the trade or commercial sense.

APPEAL from Ninth Judicial District Court, White Pine County; *Mark R. Averill*, Judge, presiding.

Action by the State against the University Club, a corporation. From a judgment for plaintiff, defendant appeals. **Reversed.**

The facts sufficiently appear in the opinion.

Chandler & Quayle, for Appellant:

A fundamental inquiry is whether or not the club under consideration is a *bona fide* club organized and conducted in good faith for social purposes; or whether, on the other hand, the club is a mere sham organized primarily for the purpose of selling liquor as a private business in evasion of the statutes. In the cases of the latter sort the courts are unanimous in holding the so-called clubs amenable to the license statutes.

Argument for Appellant

Considering the great number of cases which have been decided on the question of the amenability of social clubs to liquor statutes, it will be helpful to classify these cases into the divisions in which they naturally fall by reason of the differences in the particular statutes under consideration.

Where the statute expressly names clubs as subject to its provisions, thereby showing the legislative intent to include them, clubs are, of course, held to be within the provisions of the statute.

Where the statute is absolutely prohibitive of any sale or other distribution of liquor, thereby showing the intent to absolutely prevent the sale, distribution or handling of liquor by any one, the courts have almost unanimously held that clubs are prohibited from selling, distributing, or handling liquor.

Where, however, the statute imposes a license on persons engaged in the "business" of selling liquors, it is held that social clubs are not required to take out such license, even though the language of some portion of the statute may be broad enough in itself to cover club transactions or to cover single sales of liquor, the holding in such cases being that social clubs are not engaged in the "business" within the meaning of the statute. Such cases are: *Cuzner v. California Club*, 100 Pac. (Cal.) 868, 20 L. R. A. (N. S.) 1095; *State v. Austin Club*, 33 S. W. (Tex.) 113, 30 L. R. A. 500; *Piedmont Club v. Commonwealth*, 12 S. E. (Va.) 963; *Barden v. Montana Club*, 25 Pac. (Mont.) 1043; *Manassas Club v. Mobile*, 25 South. (Ala.) 628; *Tennessee Club v. Dwyer*, 47 Am. Rep. (Tenn.) 298; *State v. New Orleans Club*, 40 South. (La.) 526; *Koenig v. State*, 26 S. W. (Tex. Crim. App.) 835; *State v. Duke*, 137 S. W. 654. This last principle is, of course, supported by the cases hereinafter mentioned, decided under statutes which do not expressly mention "business," but in which the courts hold that the intent of the statute was to apply only to those engaged in the "business."

The following cases, which were decided under statutes not involving the element of "business," and which hold

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that a license is required of clubs or that prohibitive statutes had been violated by the club in the particular cases, nevertheless recognize the distinction between the statutes imposing the license on the "business" of selling liquors and cases decided under statutes not involving the element of business: *State v. Lockyear*, 59 Am. Rep. (N. C.) 287; *Martin v. State* (see *State v. St. Louis Club*), 59 Ala. 34; *State v. Boston Club*, 12 South. (La.) 895, 20 L. R. A. 185; *Kranvek v. State*, 41 S. W. (Tex.) 612; *State v. Shumate*, 29 S. E. (W. Va.) 1001; *U. S. v. Alexis Club*, 98 Fed. (Pa.) 725; *State v. Minnesota Club*, 119 N. W. (Minn.) 494, 20 L. R. A. (N. S.) 1101; *Ex Parte Bond*, 107 Pac. (Cal.) 143; *Nashville Club v. Shelton*, 56 S. W. (Tenn.) 838-840; *U. S. v. Wittig*, Fed. Cas. No. 16,748; *Ada County v. Boise Commercial Club*, 118 Pac. (Idaho) 1086.

But where the club in question is a *bona fide* social club and where the statute is not prohibitive, but is a license statute, and does not expressly mention social clubs and does not expressly impose a license tax on the "business" of selling liquors, but does impose a license tax on the sale of liquors, the courts are divided on the question as to whether or not the handling of liquor by social clubs constitutes technical sales, so as to bring the club within the provisions of the statute.

The bare reading of these sections (Rev. Laws, 3733, 3737) discloses, beyond a possibility of doubt, that the license tax is imposed on the transaction of the business of disposing of "any spirituous, malt or fermented liquors or wines in less quantities than one quart." Section 3733 only requires the license to be taken out "before the transaction of any such business," and it further requires that the license be taken from the sheriff of the county in which he or she proposes to do such business. By the terms of section 3737 it is provided that the license shall be procured immediately before the commencement of any business or occupation subject to license, and that such license shall authorize the party obtaining the same to transact business as specified

Argument for Respondent

in the license, but shall not authorize any person to carry on any business in an incorporated city without also taking out the city license. The penal part of the section only makes it a misdemeanor for a person to "commence or continue to carry on or transact any business, trade, profession or calling for the transaction of or carrying on of which a license is required by this act, without procuring such license." And the section further authorizes such a suit as the one in the case at bar to be brought if any person required by the provisions of the act to take out a license shall fail to do so or shall carry on or attempt to carry on business without such a license. Under these provisions of the statute there can be no possible doubt that it was the intent of the legislature to impose the license tax on the transaction or carrying on of the business of disposing of liquors or wines in less quantities than one quart. It is further shown that the license was intended as a tax on the business from the provisions of sections 3740, 3742, and 3745.

Cleveland H. Baker, Attorney-General, *C. J. McFadden*, District Attorney, and *Charles R. Reeves*, for Respondent:

C. J. McFadden, district attorney of White Pine County, in the brief for respondent, cites the following cases in support of the liability of appellant for liquor licenses: *The Law and Order Club*, 62 L. R. A. 884; *City of Spokane v. Baughman*, 103 Pac. 14; *Lloyd v. Canon City*, 103 Pac. 288; *South Shore Club v. People*, 81 N. E. 805; *State v. Minnesota Club*, 119 N. W. 494; *State v. New Orleans*, 40 South. 526; *State v. Chesapeake Club*, 63 Md. 446; *State v. Eastern Swail Club*, 74 Md. 585; *People v. Andrews*, 6 L. R. A. 128; *People v. Soule*, 2 L. R. A. 494; 20 L. R. A. (N. S.) 1095; *Marmont v. State*, 48 Ind. 21; *State v. Johns*, 118 N. W. 295; *U. S. v. Gillier*, 54 Fed. 656.

Charles R. Reeves, ex-district attorney, for respondent, cites the following additional authorities: *U. S. v. Alexis Club*, 98 Fed. 725; *U. S. v. Wittig*, 28 Fed. 744; *Butler v. Thompson*, 28 U. S. Sup. Ct. 684; *Army and Navy Club v.*

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District of Columbia, 8 D. C. App. 544; *University Club v. Louisville*, 11 Ky. 902; *Kentucky Club v. Louisville*, 17 S. W. 743; *Nashville Club v. Sheldon*, 56 S. W. 838; *Brown v. State*, 114 S. W. 198; *Town of Phœbus v. Manhattan Social Club*, 52 S. W. 838; *State v. Shumate*, 29 S. E. 1001; *Martin v. State*, 59 Ala. 34; *Newark v. Essex Club*, 20 Atl. 764; *State v. Lockyear*, 59 Am. Rep. 287; *Nogales Club v. State*, 69 Miss. 218; *Marmon v. State*, 43 L. R. A. 398; *State v. Boston Pickwick Club*, 20 L. R. A. 185; *State v. Mercer*, 32 Iowa, 405; *State v. Bacon*, 44 App. 86; *Halkins v. State*, 114 S. W. 813; *Mainning v. Canon City*, 103 Pac. 288; *Ada County v. Boise Commercial Club*, 118 Pac. 1086; *Ex Parte Cutting*, 121 Pac. 305; *Bachelors Club v. City of Woodburn*, 119 Pac. 338; *Canon City Club v. People*, 121 Pac. 120.

By the Court, NORCROSS, J. :

This is an action brought by the state to recover from the appellant the sum of \$377.50, alleged to be owing by appellant on account of state and county retail liquor licenses. Appellant denied liability for any such licenses. The case was tried upon an agreed statement of facts, and judgment rendered in favor of the state. From the judgment, the defendant has appealed. The case presents the question of the liability of a *bona fide* social club disposing of liquors to members and guests to pay the state and county retail liquor licenses.

It is provided in the articles of incorporation of the defendant company that "the corporation shall not be conducted for profit to its members and shall not have any capital stock." The management of the affairs of the club is in a board of trustees, consisting of seven members.

Article 3 of the articles of incorporation provides:

"The nature of the business and the objects and purposes proposed to be transacted, promoted and carried on by the said corporation are:

"1. To promote the social, intellectual and moral welfare of its members.

"2. To encourage, when practical, the establishment of scholarships in American institutions of learning.

"3. To assist in the growth and development of a liberal system of education.

"4. To advance the study of the sciences, arts and literature.

"5. To buy, own, acquire, sell, mortgage and lease real estate and personal property of all kinds and description necessary, incidental to or convenient for the objects and purposes of the said corporation as herein set forth and for the purpose of providing a meeting place for and the entertainment of the members of said corporation."

The constitution and by-laws of defendant corporation places restrictions upon its membership and those who may be admitted to its clubhouse as guests. The corporation maintains a clubhouse in the town of Ely as a place of meeting and for the comfort and entertainment of its members and guests. Visitors to the club are confined to nonresidents of Ely district, with the exception that a member may introduce to the club residents of the district not oftener than once in sixty days, nor more than two at any one time. At the clubhouse liquors are disposed of to members and guests at a fixed charge as an incident to the general purposes of the club. Whatever profit is made upon sales of liquor goes to pay the general expenses of the organization. That the defendant is in every respect what is frequently mentioned in decisions as a *bona fide* social club is conceded.

An act supplementary to the general revenue act "and to provide for a state license upon the business of disposing at retail or wholesale of spirituous, malt or vinous liquors in this state, and providing penalties for violation hereof," approved March 15, 1905 (Rev. Laws, 3777-3785), in so far as the same is material to a consideration of the questions involved in this case, provides:

"On the first day of July, A. D. one thousand nine hundred and five, and annually thereafter on January first, every person, firm, company or corporation manufacturing or selling, either at retail or wholesale, any

spirituous, malt or vinous liquors shall, in addition to the licenses now provided by law, take out a state liquor license as hereinafter provided, which license shall not be transferable by sale, assignment or otherwise. * * *

"SEC. 3. The several sheriffs of the respective counties of this state are hereby made the collectors of, and authorized and required to issue and collect, said licenses, and shall, upon the payment of fifty (\$50) dollars, issue a retail state license to any person, firm, company or corporation engaged in selling spirituous, malt or vinous liquors in quantities less than five gallons. * * *

Section 121 of the general revenue act (Rev. Laws, 3733) provides: "Any person or persons who may dispose of any spirituous, malt or fermented liquors or wines, in less quantities than one quart, shall, before the transaction of any such business, take out a license from the sheriff of the county in which he or she proposes to do such business, and pay therefor the sum of ten dollars per month. * * *

The following section, relative to the license upon hotels, innkeepers, restaurants, and the like, contains the provision: "Nothing in this section shall be so construed as to include the right to sell spirituous or malt liquors and wines, but the same shall be distinct and separate business therefrom, and require separate and exclusive license therefor." (Rev. Laws, 3734.)

The question of the liability for license of social clubs which dispose of liquors to members and guests has been frequently before the courts. Many of the cases turn upon the question of *bona fides* of the organization as a social club. The decisions are unanimous in holding that sham organizations for the purpose of evading license, but in reality conducted for profit, are liable for license. Other cases, considering the liability of *bona fide* social clubs which dispense liquors to their members and guests, turn upon the language of the statute under consideration. Where the statute imposes a license upon the sale of liquors, as distinguished from a license upon the business of disposing of liquors, the authorities are not

entirely in accord as to the liability of a *bona fide* social club for liquor license.

The federal internal revenue liquor law provides: "Every person who sells or offers for sale foreign or domestic distilled spirits or wines in less quantities than five wine gallons at the same time shall be regarded as a retail dealer in liquors." (U. S. Rev. Stats. 3244; U. S. Comp. St. 1901, p. 2097.)

Considering the liability of an incorporated social club to pay the federal license, McPherson, J., in *U. S. v. Alexis Club* (D. C.), 98 Fed. 725, said: "The question has usually arisen upon the construction of a law licensing the sale of intoxicating drink, and the decisions that declare the transaction not to be a sale have naturally and properly been much influenced by the language of the particular law, and also by the fact that such a statute is generally, perhaps always, a penal statute, which punishes a violation of its provisions by fine and imprisonment, and is therefore to be construed strictly in favor of the accused. When such a statute speaks of a 'dealer,' or of a 'dramshop keeper,' or of 'selling by retail,' or of 'the business of selling,' without defining these terms, the task of definition falls upon the trial court; and there may then be little difficulty in concluding that a social club does not 'deal' in liquors, or is not engaged in the 'business' of selling, within the common meaning of these words. * * * But section 3244 of the Revised Statutes differs in an important particular from the statutes that were construed in these cases, and in some others that are cited upon the defendant's brief. This section declares expressly what is meant by a retail 'dealer,' and necessarily implies what is meant by a 'sale.' Every person is a retail dealer 'who sells or offers for sale foreign or domestic distilled spirits or wines in less quantities than five wine gallons at the same time.' Nothing is said about selling as a business, or selling as an innkeeper; nor is there any other limitation of the words 'sells or offers for sale' than the single limitation concerning the quantity to be sold at one

time. In the face of language so clear, there is no room for construction. In my opinion, the plain meaning is that a single sale of spirits or wines, by any person, in a smaller quantity than five wine gallons, constitutes the seller a retail dealer in liquors, and makes him liable to pay to the United States a special tax of \$25."

Where, as in this state, the statute imposes a license on persons engaged in the "business" of selling liquors, the courts have universally held that *bona fide* social clubs are not liable to take out such a license, for the reason that they are not engaged in the "business," within the meaning of the statute. (*Cuzner v. California Club*, 155 Cal. 303, 100 Pac. 868, 20 L. R. A. 1095; *State v. Austin Club*, 89 Tex. 20, 33 S. W. 113, 30 L. R. A. 500; *Piedmont Club v. Commonwealth*, 87 Va. 540, 12 S. E. 963; *Barden v. Montana Club*, 10 Mont. 330, 25 Pac. 1042, 11 L. R. A. 593, 24 Am. St. Rep. 27; *Manassas Club v. Mobile*, 121 Ala. 561, 25 South. 628; *Tennessee Club v. Dwyer*, 11 Lea, 452, 47 Am. Rep. 298; *State v. New Orleans Club*, 116 La. 46, 40 South. 526; *Koenig v. State*, 33 Tex. Cr. R. 367, 26 S. W. 835, 47 Am. St. Rep. 35; *State v. Duke*, 137 S. W. 654.)

As said in the Cuzner case, *supra*, "the term 'business,' as used in a law imposing a license tax on business, trades, professions, and callings, ordinarily means a business in the trade or commercial sense; one carried on with a view to profit or livelihood."

Mr. Black, in his work on Intoxicating Liquors, reviews the authorities and makes therefrom the following deductions: "Upon the whole, therefore, notwithstanding some conflicting rules, the rational conclusion is that the intent must govern. On the one hand, if the object of the organization is merely to provide the members with a convenient method of obtaining a drink when they desire it, or if the form of membership is no more than a pretense, so that any person, without discrimination, can procure liquor by signing his name in a book or buying a ticket or a chip, thus enabling the proprietor to conduct an illicit traffic, then it falls within the terms of the law. But, on

the other hand, if the club is organized and conducted in good faith, with a limited and selected membership, really owning its property in common, and formed for social, literary, artistic, or other purposes, to which the furnishing of liquor to its members would be merely incidental, in the same way and to the same extent that the supplying of dinners or daily papers might be, then it cannot be considered as within either the purpose or the letter of the law." (Black on Intoxicating Liquors, sec. 142.)

While the question involved in this case is presented for the first time to this court, it has heretofore been presented to the attorney-general's office for an opinion. From an opinion of the attorney-general, found on page 71 of the biennial report for the years 1907-1908, we quote: "In view of the foregoing provision of the statutes of this state, and of the weight of authority to the effect that clubs or associations organized in good faith for lawful social enjoyment, under the usual rules, owning property, having a board or committee for the government of its affairs, limiting or restricting its membership to a certain number or class, requiring individual members to possess certain qualifications, and charging an admission fee or dues, do not come within the purview of similar statutes, I am of the opinion that no such club or organization in Nevada, in the absence of further municipal regulation, is liable for such license under the present law."

The title of the act relative to state liquor licenses, the form of the license prescribed in said act, and the provisions of the statute relative to county liquor licenses specifically refer to the "business" of disposing of liquors by retail or wholesale. (Rev. Laws, 3733, 3734, 3777, 3778, *supra*.)

The term "business," as used in these statutes, clearly, we think, means business in the trade or commercial sense, as held by the courts construing similar statutes.

As the question is one entirely subject to legislative control, the legislature can, if it so desires, amend the

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law so as to require licenses from social clubs the same as it now requires the same from persons engaged in the business of selling liquors.

The judgment is reversed.

TALBOT, C. J.: I concur.

MCCARRAN, J., having become a member of the court after the argument and submission of the case, did not participate in the foregoing opinion.

[No. 2032]

STATE OF NEVADA, RESPONDENT, v. ANDRIZA
MIRCOVICH, APPELLANT.

1. CRIMINAL LAW—EVIDENCE—CONFESSION—NECESSITY OF CAUTION.

Voluntary statements made by accused while in custody, without the use of force, threats, inducements, or promises, or hope of reward, were not inadmissible in evidence merely because he was not first informed that they might be used against him; there being no statutory provision in this state that confessions shall not be admitted unless it appears that accused was warned that what he should say might be used against him.

2. CRIMINAL LAW—APPEAL—HARMLESS ERROR.

Where evidence showed conclusively and was undisputed that the accused killed deceased with a knife, the admission of his statements as to his possession of the knife by which deceased was killed, even if erroneous because he was not warned that they might be used against him, did not require a reversal in view of Rev. Laws, 7302, requiring the court, after hearing the appeal, to give judgment without regard to technical error or defect not affecting the substantial rights of the parties, and section 7469 providing that no judgment shall be set aside or new trial granted on the ground of misdirection of the jury or improper admission or rejection of evidence, or for error as to any matter of pleading or procedure, unless the court, after an examination of the entire case, is of the opinion that the error has resulted in a miscarriage of justice or has actually prejudiced the defendant in respect to a substantial right.

3. CRIMINAL LAW—TRIAL—ARGUMENT OF COUNSEL.

A remark of the district attorney in arguing in favor of the death penalty that if the jury could not pronounce by their verdict the death penalty upon defendant, "Let's resurrect old Casey that killed Mrs. H. and let him live again," without

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stating the facts in regard to the commission of the crime for which Casey was hanged, and evidently with the assumption that the jurors were aware of the punishment suffered by him, was not beyond the bounds of legitimate argument.

4. CRIMINAL LAW—TRIAL—ARGUMENT OF COUNSEL.

On a trial for murder, where there was evidence that accused had stated that he was an anarchist, a reference to him by the district attorney in his argument as an anarchist was not prejudicial error.

5. CRIMINAL LAW—TRIAL—ARGUMENT OF COUNSEL.

Prosecuting attorneys are not justified in their argument in accusing a defendant with being guilty of offenses against the statutory or moral law, as to which there is no evidence; mere abuse or the application of vile epithets not being proper argument.

6. CRIMINAL LAW—TRIAL—ARGUMENT OF COUNSEL.

On a trial for murder, where a witness for the state on cross-examination had denied he had advocated "swinging" accused, but admitted that he thought that the crime was such that the county should be saved the expense, it was not error for the district attorney to refer to such testimony as an argument in favor of the death penalty.

APPEAL from Fifth Judicial District Court, Nye County;
Mark R. Averill, Judge.

Andriza Mircovich was convicted of murder in the first degree, and appeals. **Affirmed.**

The facts sufficiently appear in the opinion.

J. E. McNamara, for Appellant:

The district attorney, in his zeal for a conviction, in his closing address went outside the evidence and referred to a crime committed in Goldfield, saying: "Why, gentlemen of the jury, if you cannot pronounce by your verdict the death penalty upon this defendant, I say, let's resurrect old Casey and let him live again." Such statement was seriously prejudicial to defendant's legal rights and must and did influence and bias the minds of the jury. Because of said statement the defendant was deprived of his constitutional right to a fair and impartial trial. (*Tillery v. State*, 5 Am. Rep. 882; *Brown v. Swineford*, 28 Am. Rep. 582; *People v. Ah Len*, 27 Am. St. Rep. 103; *People v. Vielleres*, 127 Cal. 66; *People v. Aiken*, 11 Am. St. Rep. 512; *Martin v. State*, 56 Am. Rep. 812; *McDonald v. People*, 9 Am. St. Rep. 559-570, note.)

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The same may be said with reference to the district attorney's statement: "If the jurors of this county do not uphold the law, who will?" and then refers to defendant as an anarchist, gives his definition of an anarchist, and asks how long it will be before anarchists take possession of this country. Such statements were foreign to the case and tended to inflame the minds of the jury.

It was improper and prejudicial for the district attorney to make use of the statement of an opinion expressed upon the street by one who is later called as a witness, to the effect that this man believed that the crime with which defendant was accused was such that the county should be spared the expense of the trial. (*State v. Rodriguez*, 31 Nev. 342, and authorities, *supra*.)

It was also improper and prejudicial for the district attorney to state that the defendant sought the time and place and the opportunity to do what he did, when the evidence, on the contrary, was to the effect that the defendant was on his way to the cemetery.

The court's instruction to the jury not to consider as evidence statements and remarks made by counsel would not cure the evil done. It is an utter impossibility to remove impressions so acquired from the mind of the juror so as to enable him to give the defendant a fair trial.

It was error to admit statements made by defendant while in the custody of the officers without defendant being informed of his right, or told that any statement he might make might be used against him.

Cleveland H. Baker, Attorney-General, for Respondent:

The confession of defendant was not obtained by reason of oral threats of harm or by promises of benefit and was voluntary. The remarks of the district attorney were proper comment on the matters in evidence in the case. They were not prejudicial. The jury was properly instructed as to what was in evidence in the case and to disregard any statements made by any attorney in his argument. (*State v. Petty*, 32 Nev. 385; *State v. Zumbunson*, 7 Mo. App. 526, 86 Mo. 111; 1 Thompson on

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Trials, 805; *State v. Comstock*, 20 Kan. 650; *Friemark v. Rounkrans*, 81 Wis. 359.)

The alleged improper remarks of the district attorney should have been objected to at the time. (1 Thompson on Trials, 799-800.)

The provisions of Rev. Laws, 7302, 7469, apply to this case.

By the Court, TALBOT, C. J.:

Defendant was convicted of the crime of murder in the first degree under an indictment charging him with the killing of John Gregovich by stabbing with a knife at Tonopah on the 14th day of May, 1912. Upon the trial the case was submitted to the jury upon the evidence introduced on the part of the state.

[1] Two errors are assigned as grounds for reversal of the judgment. It is contended that the court erred in admitting certain statements and admissions in the nature of a confession made by defendant to certain officers in Nye County shortly after the assault and while he was in custody. The proof shows that these statements were made voluntarily by the defendant, and without the use of force, threats, inducements, or promises, or hope of reward; but there is no showing that, previous to making such statements, the officers having defendant in custody informed him that, if he made any statements, they might be used against him. This assignment of error is without merit, as there is no statute in this state, as there is in a few states, forbidding the admission of a confession made by a defendant in custody, unless it appears that he was warned that what he should say might be used against him. Cyc. vol. 12, p. 463, treating this question, says: "The fact that a voluntary confession is made without the accused having been cautioned or warned that it might be used against him does not render it incompetent, unless a statute invalidates a confession made where the accused is not first cautioned. In Texas, by statute, a confession made by a prisoner while in custody is inadmissible, unless he was warned that what he

should say might be used against him; and there are similar provisions in other states. It is not the duty of a police officer, in the absence of a statute, to caution a prisoner as to the consequences of making a statement, if the statement is voluntary, but merely to refrain from inducing him to make a statement."

[2] If we had a statute providing that statements made by a person under arrest cannot be proven unless it is shown that they have been made after he has been warned that they may be used against him, still the admission of the testimony to prove the declarations of the defendant in regard to the knife would be error without prejudice, because without this testimony it is conclusively shown that the defendant killed the deceased with a knife. If there were nothing to indicate the commission of the offense, except circumstantial evidence which left a doubt, the question as to whether it was error to admit evidence that the defendant made admissions or said that he had the knife with which the deceased was killed, without first showing that he had been warned that any declarations he might make could be used against him, might be material, while it is not so in the face of the direct and undisputed evidence that the accused killed the deceased with a knife. The same may be said regarding evidence of other declarations. The Revised Laws provide at section 7302 that: "After hearing the appeal, the court shall give judgment without regard to technical error or defect which does not affect the substantial rights of the parties"; and at section 7469 that: "No judgment shall be set aside, or new trial granted, in any case on the ground of misdirection of the jury or the improper admission or rejection of evidence, or for error as to any matter or pleading or procedure, unless in the opinion of the court to which application is made, after an examination of the entire case, it shall appear that the error complained of has resulted in a miscarriage of justice, or has actually prejudiced the defendant, in respect to a substantial right." These provisions have been slightly modified or broadened

by the new code, but are substantially similar to the one passed at the first session of the territorial legislature and in force for more than fifty years; and they are nearly the same as the one more recently recommended by the American Bar Association. (Stats. 1861, p. 499, sec. 589; Comp. Laws, 4554.)

This court has often applied this statute in murder and other cases, and refused to set aside convictions or remand actions for new trials for errors which did not affect the substantial rights of the accused. (*State v. Williams*, 31 Nev. 360; *State v. Jackman*, 31 Nev. 511; *State v. Skinner*, 32 Nev. 70; *State v. Simpson*, 32 Nev. 138, Ann. Cas. 1912c, 115; *State v. Petty*, 32 Nev. 384, Ann. Cas. 1912c, 223; *State v. Martel*, 32 Nev. 395; *State v. Depoister*, 21 Nev. 107; *State v. Vaughan*, 22 Nev. 285; *State v. Hartley*, 22 Nev. 342, 28 L. R. A. 33; *S. N. M. Co. v. Holmes M. Co.*, 27 Nev. 108, 103 Am. St. Rep. 759; *State v. Smith*, 33 Nev. 459.)

In *State v. Buster*, 23 Nev. 348, it was held that the failure of the trial court to make the proper order striking out the testimony of a witness concerning a confession was harmless error, because the same confession was conclusively established by several other witnesses whose testimony was not contradicted. As the evidence was clear and undisputed that Mircovich killed Gregovich by stabbing him with a knife, in the presence of numerous people, at the railroad station, the jury could not have found otherwise, regardless of whether testimony relating to a confession or statements concerning the knife were properly or improperly admitted. The closing argument of the district attorney was an appeal to the jury to uphold the law and fix by their verdict the death penalty. Upon the conclusion of this argument, exception was taken thereto by counsel for defendant. No particular portion thereof was at the time pointed out as objectionable; nor was any request made that the court instruct the jury to disregard the same or any portion thereof. The court, in the course of its instructions, admonished the jury as follows: "You should bear in mind that it is your duty to determine what the facts in this case are from the

evidence, and not from the statements of the judge, or from the statements made by any attorney during the progress of the case or in his argument.”

The objectionable portions of the argument pointed out in the brief are as follows: “Why, gentlemen of the jury, if you cannot pronounce by your verdict the death penalty upon this defendant, I say, let’s resurrect old Casey that killed Mrs. Hislop in Goldfield and let him live again. * * * There is another feature. You have the society of this country to uphold and maintain. If you can’t do it, who will? If the jurors of this county cannot uphold the law, who will? If it is not guarded and protected and maintained, how long will it be before anarchists take possession of this country? What is an anarchist? He is worse than the black hand, because an anarchist does not believe in government or in law. That is the proposition you must consider. When old Tom was asked whether he advocated the swinging of this man without a trial, and if he did not go up and down the streets of Tonopah making such remarks, he said ‘No,’ but he thought that the crime was such that this county should have been saved the expense. There is no excuse in this county for mob law; as long as we have courts, as long as we have men of courage, as long as we have men of honest consciences who have the good of the community at heart, there is no necessity of mob law in this western country, and there is no necessity for it in any country. * * * We don’t want it. We will not have it, gentlemen; but, if you don’t enforce the law, I say that you cannot deter crime. You cannot keep these anarchists from coming into this country, killing our presidents, and killing honest, honorable men. Think of that! Oh, but he committed this crime while there were dozens of people around. When you go to your jury room to consider your verdict, gentlemen, that fact, and that fact alone, will show you that this man sought the time and the place and the opportunity to do what he did do. Wasn’t McKinley killed in a crowd, and wasn’t Garfield killed at a railroad station amidst a rush of

people? I say that he deliberately sought the time, the place, and the opportunity to do what he did."

[3] We do not think that the reference by the district attorney to "resurrecting poor old Casey" was beyond the bounds of legitimate argument to the jury. He did not state the facts in regard to the commission of the crime for which Casey had been hanged, and apparently made the remark more by matter of comparison, and evidently with the assumption that the members of the jury were already aware of the punishment suffered by Casey.

[4, 5] If the accusation by the prosecuting officer that the defendant was an anarchist had not been supported by evidence that the defendant had so stated himself, it might have been prejudicial error, as was the accusation by the district attorney in his argument before the jury in the case of *State v. Rodriguez*, 31 Nev. 345, that he was a "macque," when there was no evidence to support it. Prosecuting officers are not justified, in their zeal to convict, in accusing persons on trial charged with crime with being guilty of offenses against the statutory or moral law when there is no evidence to substantiate their assertions. Mere abuse or the application of vile epithets, unsupported, is not proper argument.

[6] The comment of the district attorney on, and in accordance with, the testimony given by a witness on the trial, who stated that he had not advocated on the streets of Tonopah the swinging of the accused, but he thought that the crime was such that the county should have been saved the expense, is not deemed reversible error, under the circumstances. Whether the witness thought that the expense should be saved by hanging the accused without a trial, or by dismissing the charge against him, is not made certain. If such testimony had been offered by the state, and objection made, it would have been properly excluded; but as it was brought out by cross-examination on the part of the defendant, apparently for the purpose of showing the feeling of the witness, it was not error for the district attorney to quote the testimony

Norcross, J., concurring

after it had been elicited by the defendant, even if it be inferred from the language used by the witness that he favored the lynching of the accused. It is a different situation than it would be if such testimony had been introduced by the state, under the objection and exception of the defendant, and thereafter the district attorney had made the comment and the defendant had taken specific exception.

The judgment and order denying the motion for a new trial are affirmed, and the district court is directed to fix a time and make the proper order for having its sentence carried into effect by the warden of the state prison.

NORCROSS, J., concurring:

I concur in the judgment and in the opinion of the chief justice generally. The closing argument of the district attorney, to which serious objection has been urged upon the appeal, in some particulars I think is not to be commended. This argument was directed entirely to an appeal for the infliction of the death penalty. In view of the record in this case, however, I am of the opinion that the argument did not violate the substantial rights of the defendant.

MCCARRAN, J., having become a member of the court after the argument and submission of the case, did not participate in the foregoing opinion.

Points decided

[No. 2016]

J. E. MCKINNON, SUPERINTENDENT OF THE STATE ORPHANS' HOME, JOHN E. BRAY, WILLIAM McMILLAN, AND C. L. DEADY, AS THE BOARD OF ORPHANS' HOME COMMISSIONERS, PETITIONERS, v. THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA IN AND FOR WASHOE COUNTY, AND THE HON. COLE L. HARWOOD, JUDGE THEREOF, RESPONDENTS.

1. "ORPHANS' HOME" — "REFORMATORY" — "DEPENDENT AND NEGLECTED CHILDREN."

Under the act of 1873 (Stats. 1873, c. 45), as amended by Stats. 1903, c. 41 (Rev. Laws, 4099) relative to the State Orphans' Home, providing that any district judge upon a showing that an orphan is the child of parents one or both of whom were at the time of their decease residents of the state, and that the condition of the orphan is such that it would be for his best interest to be admitted to such home, may commit the orphan to the home at the expense of the county, and that the directors at their discretion may receive any child from a living resident parent or guardian and require such parent or guardian to contribute to its support, but that no child shall be so received unless sent by the county commissioners of the county in which the child resides, who shall agree to pay for its maintenance, and juvenile court law March 24, 1909 (Stats. 1909, c. 180, sec. 7), as amended by Stats. 1911, c. 197 (Rev. Laws, 734), providing for the commission of dependent and neglected children to any suitable state institution organized for the care of dependent or neglected children, and section 1, under which "dependent and neglected children" include those having immoral, evil, or incorrigible tendencies, the court could not commit to the State Orphans' Home a dependent or neglected child who was not an orphan, since an "orphans' home" is an institution or home for the care of destitute orphans, and not a "reformatory" or institution in which young offenders are confined and instructed, with a view to their reformation.

2. CONTEMPT—PROHIBITION.

Alleged violation of a void order of court does not constitute contempt of court, and prohibition will lie to prevent proceeding to punish for such alleged contempt.

ORIGINAL PROCEEDING in prohibition by J. E. McKinnon, Superintendent of State Orphans' Home, John E. Bray, William McMillan, and C. L. Deady, as the Board of Orphans' Home Commissioners, directed to the Second Judicial District Court of the State of Nevada in and

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for Washoe County, and Hon. Cole L. Harwood, Judge thereof, to prohibit the latter from further proceedings in contempt. **Writ granted.**

The facts sufficiently appear in the opinion.

Geo. B. Thatcher, Attorney-General, for Petitioners.

L. A. Gibbons, for Respondents.

By the Court, TALBOT, C. J.:

The petitioner McKinnon is the superintendent of the State Orphans' Home, and petitioners Bray, superintendent of public instruction, C. L. Deady, surveyor-general, and William McMillan, state treasurer, constitute the board of directors of that institution. This is an application by them for a writ to prohibit the Second judicial district court and Hon. Cole L. Harwood, the judge thereof, from punishing them for contempt for refusing to receive at the orphans' home a child which was by that court ordered committed to that institution under the act relating to dependent, neglected, or delinquent children, and designated as the "Juvenile Court Law." The order was made in a proceeding entitled *The State of Nevada in the interest of Howard Eggendorfer, a Dependent Child, Plaintiff, v. Carrie Eggendorfer, His Mother, Defendant*, to which the petitioners were not made parties. The order also recites: "The above-named Howard Eggendorfer having been regularly brought before the above-entitled court upon a petition duly verified and filed, as provided in the statute of the State of Nevada, said petition showing that said Howard Eggendorfer was within the said county of Washoe, and is a dependent child within the meaning of said statute, and due notice of the hearing of said petition having been given, and Carrie Eggendorfer, the mother of said child, and the only parent thereof, appearing and being present in the above-entitled court upon the hearing thereof, and it appearing to the satisfaction of the court that the said Howard Eggendorfer is under the age of 18 years, and

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is of the age of 13 years, and within the said county of Washoe, and is a dependent child within the meaning of said statute, and that his mother is unable to properly take care of, train, educate, and maintain said dependent child, and it further appearing that it is for the best interests of said child and other people of this state that said child be taken from the custody of his mother, and that he be committed to the care of the State Orphans' Home at Carson City, Nevada, the same being a suitable state institution for the care of dependent and neglected children: Now, therefore, it is hereby ordered, adjudged and decreed that the said Howard Eggendorfer is a dependent child within the meaning of the statute of this state, and that he be and hereby is committed to the care of said State Orphans' Home at Carson City, Nevada, for the period of his minority, or until the further order of this court, and that the superintendent of said institution, J. E. McKinnon, is hereby appointed guardian of said dependent child, Howard Eggendorfer, during the time he is kept under this order in said institution, and that the expense of his keep and care shall be borne by and paid by the State of Nevada at a monthly cost of not to exceed \$10, and that said J. E. McKinnon, as guardian, shall place said child in said State Orphans' Home and hold said child, care for, train, and educate him subject to all the rules and laws in force governing said State Orphans' Home, and said J. E. McKinnon and said State Orphans' Home are hereby directed and authorized to receive and care for said dependent child, Howard Eggendorfer."

In the petition filed in this court it is alleged that the order of the district court was made without the consent and without consultation with or notice to any of the petitioners, and that the petitioner, McKinnon, the superintendent of the State Orphans' Home, was appointed the guardian of the child without his consent or notice to him; that no order of the board of county commissioners of Washoe County was ever made committing Howard Eggendorfer to the State Orphans' Home; that the petitioners "Bray, Deady, and McMillan, acting as the board

of directors of the State Orphans' Home, in the exercise of their discretion imposed on them by statute, and acting upon the advice and report of its examining physician that said Howard Eggendorfer, by reason of his diseased condition and unclean habits, was an unfit person to be received into the said home, refused to admit into or accept such Howard Eggendorfer as an inmate therein."

Thereafter, upon affidavit, the Second judicial district court cited the petitioners to show cause why they should not be punished for contempt of court in refusing to obey the order committing the child to the State Orphans' Home. The petitioners applied to the district court to set aside the order that citation issue and the citation and order to show cause why the petitioners should not be punished for contempt, and also moved to set aside the original order committing Howard Eggendorfer to the State Orphans' Home and appointing J. E. McKinnon, as superintendent, guardian of the child.

It is alleged that the district court refuses to set aside these orders, and threatens to, and will, unless prohibited by this court, punish the petitioners for contempt in refusing to obey the orders of the district court, notwithstanding that these orders and citation are wholly void and in violation of law, and without authority or jurisdiction of the district court, and in usurpation of the rights, powers and duties of the petitioners as the board of directors of the State Orphans' Home. Provision was made for a State Orphans' Home by the acts of March 3, 1869 (Stats. 1869, c. 62), and March 1, 1873 (Stats. 1873, c. 45; Rev. Laws, 4087-4103). The act of 1873 provides that the administration of the State Orphans' Home shall be under the control of three directors, to consist of the superintendent of public instruction, surveyor-general, and state treasurer, and that they shall have power to manage and administer the affairs of the home.

It also provides that all orphans duly admitted to the State Orphans' Home become the wards of the state and are entitled to the care, protection, and guardianship of the state, which for the care, protection and guardianship of such wards is entitled to their services, and has

the right to train and educate them for useful places in society, and that such rights of the state are superior to the claims of relations or persons, resident or nonresident.

It is also provided that upon the application in writing of any citizen of the state to the district judge of any county in behalf of any whole orphan, showing such orphan to be the child of parents, one or both of whom at the time of decease were residents of the state, and that the condition of the orphan is such that it would be for his or her best interest to be admitted to the State Orphans' Home, the district court may after notice take testimony and order the orphan committed to the home, the expenses of the proceedings and the transportation of the orphan to the home to be a county charge.

It is also provided by section 11 of said act that "whenever said board shall deem it for the best interests of any orphan in said home, or of the state, they may discharge any orphan therein," and apprentice any orphan in the home to the head of any family or person carrying on a useful or proper business.

Sections 12 and 13 of the act of 1873, as amended in 1903 (Stats. 1903, c. 41, secs. 1, 2; Rev. Laws, 4098, 4099) are as follows:

"SEC. 12. Nothing in this act shall be construed to prevent the board of directors, at their discretion, from receiving any child from its living resident parent, parents, guardian or guardians, upon a proper showing to their satisfaction of the inability of such parent, parents, guardian or guardians, to support and care for such child; and that such board may require the living parent, parents, guardian or guardians of such child so admitted, to contribute such sum to its support as said board may determine.

"SEC. 13. Children admitted to the State Orphans' Home under the provisions of section 12 of this act, as amended, are hereby adjudged and declared to be wards of the state as fully as whole orphans, subject only to such conditions of admission as may be fixed by the board of directors; *provided*, that no child shall be

received by the board of directors of said orphans' home unless they be sent by the county commissioners of the county in which the children reside; *and further provided*, that the county from which the child is sent shall agree by its county commissioners to pay for the maintenance of said child at a reasonable rate, said rate to be fixed by the board of directors of said orphans' home."

The forepart of section 1 of the act of March 24, 1909, (Stats. 1909, c. 180; Rev. Laws, 728) relating to dependent, neglected, or delinquent children, is as follows: "This act shall be known as the 'Juvenile Court Law' and shall apply only to children under the age of eighteen years not now or hereafter inmates of a state institution, except as otherwise herein provided. For the purpose of this act the words 'dependent child' and 'neglected child' shall mean any child who, while under the age of eighteen years, for any reason is destitute, homeless or abandoned; or dependent upon the public for support; or has not proper parental care or guardianship; or habitually begs or receives alms; or is found living in any house of ill-fame, or with any vicious or disreputable person, or has a home which by reason of neglect, cruelty or depravity on the part of its parents, guardian or any other person in whose care it may be, is an unfit place for such child, or who, while under the age of ten years, is found begging, peddling or selling any article or articles, or singing or playing any musical instrument for gain or giving any public entertainments upon the street, or accompanies or is used in the aid of any person so doing; or is incorrigible, or knowingly associates with thieves, vicious or immoral persons; or without just cause, and without the consent of the parents, guardian or custodian, absents itself from its home or place of abode, or is growing up in idleness or crime; or knowingly frequents or visits a house of ill-fame or ill-repute; or knowingly frequents or visits any policy shop or place where any gaming device is operated; or patronizes, visits or frequents any saloon or dram shop where intoxicating liquors are sold;

or patronizes any public poolroom where the game of billiards or pool is being carried on for pay or hire; or who wanders about the streets in the nighttime without being on any lawful business or any lawful occupation; or habitually wanders about any railroad yards or tracks, or jumps or attempts to jump onto any moving train; or enters any car or engine without lawful authority, or writes or uses vile, obscene, profane or indecent language, or smokes cigarettes in any public place or about any schoolhouse; or is guilty of indecent, immoral or lascivious conduct; any child committing any of these acts shall be deemed a delinquent child, and when proceeded against, such proceedings shall be on behalf of the state in the interest of the child and the state, with due regard for the rights and duties of parents and others, by petition to be filed by any reputable person, and to that end it shall be dealt with, protected and cared for in the district court as a ward of the state in the manner hereinafter provided. The words 'delinquent person' shall include any person under the age of eighteen years who violates any law of this state or any ordinances of any town, city, county, or city and county of this state, defining crime."

Section 2 (Rev. Laws, 729) confers jurisdiction upon the district courts in all cases coming within the terms of the act. In the latter part of section 7 (Rev. Laws, 734) the following provision appears: "And if parent, parents, guardian or custodian consent thereto, or if the court shall further find that the parent, parents, guardian or custodian of such child are unfit or improper guardians or are unable or unwilling to care for, protect, train, educate, correct or discipline such child and that it is for the interest of such child and other people of this state that such child be taken from the custody of its parents, custodian or guardian, the court may make an order appointing as guardian of the person of such child, some reputable citizen of good moral character, and order such guardian to place such child in some suitable family, home or other suitable place which such guardian may provide for such child, or the court may enter an order committing such child to some suitable state institution,

of this or any other state organized for the care of dependent or neglected children, or to some training or industrial school or children's home-finding society of this or any other state, or to some association embracing in its objects the purpose of caring for or obtaining homes for neglected or dependent children, which association shall have been accredited as heretofore provided. As amended, Stats. 1911, 387."

The real question to be determined is whether the juvenile court law enacted in 1909 authorizes the commitment of dependent or neglected children to the State Orphans' Home established by an act of the legislature approved forty years ago. The orphans' home act contains humane provisions for the care, education, protection, guardianship, and admission to the home of orphans. As amended in 1903, sections 12 and 13, above quoted, provide that the board of directors at their discretion may receive any child from its living resident parent, parents, or guardian, upon the proper showing to their satisfaction of the inability of such parent, parents or guardian to support and care for such child, and that the board may require the living parent, parents, or guardian to contribute to its support, provided that no child shall be received by the board of directors of the orphans' home, unless sent by the county commissioners of the county in which the child resides, and provided that the county commissioners shall agree to pay for the maintenance of the child at a reasonable rate, to be fixed by the board.

It is apparent that this act makes provision for the care only of orphans and, at the discretion of the board, of children whose parents are unable to support or care for them, and that the latter class of children can be admitted only at the discretion of the board, upon an order of the county commissioners, and payment by the parent or county of a reasonable price for maintenance, to be fixed by the board.

It is contended that the provision in section 7 of the juvenile court law that "the court may enter an order committing such child to some suitable state institution,

of this or any other state organized for the care of dependent or neglected children" authorizes the court to commit dependent or neglected children to the orphans' home. Is the orphans' home a state institution organized for the care of dependent and neglected children? Under the definition and language in section 1 of the juvenile court law, hereinbefore quoted, dependent children and neglected children include ones of immoral, vicious, or incorrigible tendencies, and the act further relates to "delinquent" or criminal children. It does not mention the orphans' home, nor as a class does it refer to orphans or to children having parents who are unable to give them support.

If respondent is correct in the contention that the district court is authorized to commit dependent and neglected children to the orphans' home, the children of the various counties of the state having immoral, evil, and incorrigible tendencies, included under the definition of dependent child and neglected child, may be committed to the orphans' home and maintained there at the expense of the state, notwithstanding the protest of the board of directors of that institution, to associate with and influence for bad the most innocent and worthy children there, with the result that the home would be converted into a reform school for the children of evil tendencies, to the detriment of the orphans free from vicious inclinations, and for whom the home was established. We do not believe that the legislature intended such results without saying so. We are of the opinion that the orphans' home was wisely and charitably provided only for such children as are so unfortunate as to be without parents and need to be maintained at the expense of the state, and at the discretion of the board of directors for children whose parents are unable to give them support and proper care, if the expense of their maintenance at the home is paid for by the parent or county; and that, notwithstanding the juvenile court law, the home is not intended for nonorphan, dependent and neglected children, which under the statute includes children of vicious tendencies. "Orphans' Home" has

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a well-known meaning, different from a reformatory. Leading dictionaries contain the following definitions: "Orphanage—An institution or asylum for the care of orphans." "Reformatory—A penal institution to which young offenders are committed." (Webster.) "Orphanage—An institution for the care of destitute orphans." "Reformatory—An institution in which offenders are confined and instructed with a view to their reformation rather than mere punishment." (Standard.) "Orphanage—An institution or home for orphans." "Reformatory—An institution for the reception and reformation of youths who have already begun a career of vice or crime." (Century.)

As the order of the district court committing Howard Eggendorfer to the orphans' home as a delinquent and neglected child is unauthorized by law, the writ of prohibition against the district court and the judge thereof will issue as demanded.

Argument for Respondent

[Nos. 2036 AND 2037]

IN THE MATTER OF THE APPLICATION OF Z. M. TAYLOR
FOR A WRIT OF HABEAS CORPUS.IN THE MATTER OF THE APPLICATION OF L. P. ROUNDS
FOR A WRIT OF HABEAS CORPUS.

1. CONSTITUTIONAL LAW—INTERSTATE COMMERCE—STATE REGULATIONS—"ITINERANT MERCHANT."

Rev. Laws, 3890-3894, inclusive (Act approved March 24, 1905, sec. 1; Stats. 1905, c. 153), makes it unlawful for any itinerant merchant or peddler to offer goods for sale without first obtaining a license. Section 2 defines an itinerant merchant, etc., as one having no permanent place of business within the state, which is not regularly located and taxed. Section 3 fixes the amount of the license required. Section 4 provides that the act shall not apply to drummers representing wholesale houses; and section 5 provides that it shall not apply to the sale of farm products. *Held*, that the act violated art. 1, sec. 8, of the constitution of the United States, relating to interstate commerce.

2. CONSTITUTIONAL LAW—LICENSES—EQUAL PROTECTION OF LAW.

The act violates the fourteenth amendment and article 4 of section 2 of the constitution of the United States, relating to equal protection of the laws.

ORIGINAL PROCEEDING in the matter of the application of R. C. Stoddard in behalf of Z. M. Taylor and L. P. Rounds for writs of *habeas corpus*. **Writs granted, and petitioners discharged.**

The facts sufficiently appear in the opinion.

R. C. Stoddard (Arthur C. Lyon, of Counsel), for Petitioners.

Cleveland H. Baker, Attorney-General, for Respondent:

The attorney-general has read with great interest the able brief of his predecessor in office, who now appears as attorney for petitioners herein, and a careful examination of the authorities cited in such brief, and of a great many other authorities not therein cited, convinces him that the points advanced by the petitioners in these cases are founded upon true principles of law, and that the statute brought into this court for review by petitioners, upon which this action is founded, is unconstitutional and void.

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It is the duty of this office and of the courts to uphold, if possible, the constitutionality of every act passed by the legislature, and to that end every authority that could be found bearing upon the subject has been examined and the most important cases tending to uphold the validity of this act were inserted so that the court can have the benefit of the cases on both sides in arriving at its decision.

The cases tending to uphold the statute are as follows: *Stull v. Demattos*, 51 L. R. A. 892; *In re Haskell*, 32 L. R. A. 527; *State v. French*, 30 L. R. A. 415; *State v. Foster*, 50 L. R. A. 339; *Fleetwood v. Read*, 47 L. R. A. 205; *State v. Hunt*, 85 Am. St. Rep. 758; *Hirshfield v. Dallas*, 15 S. W. 124; *Fretwell v. Troy*, 18 Kan. 271.

By the Court, NORCROSS, J.:

Original proceedings in *habeas corpus* in behalf of Z. M. Taylor and L. P. Rounds were instituted to obtain their release from the custody of the sheriff of Churchill County. The cases are identical and will be considered together. Taylor and Rounds were held under arrest, charged with the violation of that certain act of the legislature entitled "An act to provide for licensing itinerant and unsettled merchants, traders, peddlers and auctioneers," approved March 24, 1905 (Stats. 1905, c. 153).

From the agreed statement of facts it appears that Taylor and Rounds were authorized soliciting agents and salesmen for the Spalding Manufacturing Company of Grinnell, Iowa, a manufacturer and wholesale and retail dealer in buggies, motor cars, and other vehicles; said company having no store or other place of business in the State of Nevada, permanently located or regularly taxed therein, and said agents soliciting sales and selling the products of said company without license, as provided in said act of 1905.

The act under consideration provides:

"SECTION 1. It shall be unlawful for any itinerant or unsettled merchant, trader, peddler or auctioneer to sell or offer for sale any goods, wares or merchandise at any place in the State of Nevada, without first obtaining

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and paying for a license, as hereinafter provided; and all sales or contracts of sale made without such license shall be null and void.

"SEC. 2. An itinerant or unsettled merchant, trader, peddler or auctioneer within the meaning of this act, shall include every person, firm, or corporation, selling or offering for sale any goods, wares or merchandise, which has no permanent store or other place of business at some point or points within this state, and which is not permanently located and regularly taxed therein.

"SEC. 3. Each and every itinerant and unsettled merchant, trader, auctioneer or peddler shall, before selling or offering for sale any goods, wares or merchandise within this state, procure a license for each and every county in which such person shall attempt to sell or offer for sale any goods, wares or merchandise, which license shall not be granted for more than one month and shall cost the applicant three hundred dollars (\$300).

"SEC. 4. This act shall not apply to drummers and commercial travelers representing and acting for wholesale houses in this and other states so long as they do not attempt the sale of goods, wares and merchandise at retail in competition with established retail dealers, nor shall it in any sense alter or change the present existing laws governing merchants, traders, peddlers and auctioneers permanently established and doing business in this state; *provided, however*, that its provisions shall apply to and be enforced against any peddler or auctioneer acting for or on behalf of any itinerant merchant or trader.

"SEC. 4. * * * The provisions of this act shall not apply to the sale, or offering for sale, of the products of any farm, ranch or range situated within this state."

Section 6 fixes the penalty for the violation of the act. (Rev. Laws, 3890-3895.)

It is contended by counsel for the petitioners, and so conceded to be by the attorney-general, that the act in question is unconstitutional. The question of the constitutionality of this act was submitted to the office of

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the attorney-general, and that official, the Hon. R. C. Stoddard, counsel for petitioner herein, by opinion rendered September 1, 1907, gave it as his conclusion that the act was unconstitutional. (Biennial Report of Attorney-General 1907-1908, p. 83.)

The attorney-general in his brief says: "A careful examination of the authorities cited in such brief, and of a great many other authorities not therein cited, convinces me that the points advanced by the petitioners in these cases are founded upon true principles of law, and that the statute brought into court for review by the petitioners, upon which this action is founded, is unconstitutional and void. * * * The general trend of judicial decision, since the decision of the case of *Robbins v. Shelby Taxing District*, 120 U. S. 489, 7 Sup. Ct. 592, 30 L. Ed. 694, by the Supreme Court of the United States, has been to declare void any statute imposing an occupation tax which in any way interferes with interstate commerce, and there can be no question but that the statute here in consideration does and was intended so to interfere. The statute also discriminates between residents and nonresidents of this state, and is therefore opposed to the 'equal rights' clause of the fourteenth amendment of the United States constitution."

[1, 2] The contention of counsel for petitioner that the act of 1905 in question is violative of section 8 of article 1 of the constitution of the United States, relative to interstate commerce, and denies to certain citizens of the United States the equal protection of the law guaranteed by section 2 of article 4 and the fourteenth amendment of the federal constitution, is well taken.

In view of the fact that the law applicable to this case is so well settled and that the unconstitutionality of the act in question is conceded by the attorney-general, we deem it unnecessary to enter into an extended discussion of the questions controlling, and which are so fully covered in opinions of this and other courts. Suffice it to say that the following authorities and other authorities therein cited fully support the conclusion reached: *Ex*

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Parte Rosenblatt, 19 Nev. 439, 14 Pac. 298, 3 Am. St. Rep. 901; *Robbins v. Taxing District*, 120 U. S. 489, 7 Sup. Ct. 592, 30 L. Ed. 694; *Norfolk Ry. Co. v. Sims*, 191 U. S. 441, 24 Sup. Ct. 151, 48 L. Ed. 254; *Brennan v. Titusville*, 153 U. S. 289, 14 Sup. Ct. 829, 38 L. Ed. 719; *Spaulding v. Evenson* (C. C.), 149 Fed. 913; *Bacon v. Locke*, 42 Wash. 215, 83 Pac. 721, 7 Ann. Cas. 589; *In re Kinyon*, 9 Idaho, 642, 75 Pac. 268, 2 Ann. Cas. 699; *State v. Bayer*, 34 Utah, 257, 97 Pac. 129, 19 L. R. A. (N. S.) 297.

The petitioners are discharged from arrest and their bondsmen released.

In Memoriam

Cleveland Hall Baker

Died December 5, 1912

IN THE SUPREME COURT OF THE STATE OF NEVADA

CARSON CITY, December 16, 1912.

Court convened at 10 o'clock a. m.

E. T. Patrick, Esq., Deputy Attorney-General, now addressed the Honorable Court, announcing the death of the Hon. Cleveland H. Baker, Attorney-General of the State of Nevada, who died December 5, 1912, as follows:

May It Please the Court:

It is my mournful duty to announce officially to this Honorable Court the death of Cleveland Hall Baker, Attorney-General of the State of Nevada, which occurred at his residence in this city, after a very brief illness, on the morning of the 5th of December. He had been engaged in the duties of his office until after 5 o'clock of the previous evening and departed for his home apparently in his usual health. He was taken ill during the night and died the following morning.

So suddenly was he snatched away from among us that it is even yet difficult to realize that we will see his genial, smiling face and hear his pleasant voice no more.

Mr. Baker was a man of great fortitude and will-power, for, although he must have realized that the malady which afflicted him was fatal and his demise a matter of but a few weeks or months, no one ever heard him utter a word of complaint or mention the precarious state of his health.

To know him was to respect and admire him, and he was gifted with so much tact and was so uniformly polite that, if it was necessary, in his duty as Attorney-General, for him to interpret the law in a manner adversely to the contention of his opponent, he was able to do so and still retain the respect and friendship of the person affected by his decision. This was also exemplified by his manner in court.

Your Honors will remember an instance of this only a few weeks since when Mr. Baker, kindly and considerate in his dealings with all, excused the act of an officer, in a case where all of the attorneys interested unanimously agreed that such officer had made a mistake, by saying that it was the duty of all officers to follow the law as written.

Elected by the people to two important offices of honor and high position, he conducted the affairs thereof with credit to himself and satisfaction to the people. Exposed to all the temptations which beset one seeking and occupying such prominent positions, not one word of reproach has ever been truly uttered against him, either in his moral, political or social character, and it can well be said of him, as beautifully expressed by Tennyson, that "He wore the white flower of a blameless life."

It is proper and fitting that the passing of such a life should be duly commemorated. I, therefore, move this Honorable Court that

CLEVELAND HALL BAKER

a committee be appointed to draft resolutions of sympathy for his family and respect to the memory of our deceased brother.

Upon motion of the Hon. E. T. Patrick the Court appointed the following committee to draft resolutions upon the death of the Hon. Cleveland H. Baker, Attorney-General: Hon. Geo. B. Thatcher, Hon. William Woodburn, and Hon. H. F. Bartine.

IN THE SUPREME COURT OF THE STATE OF NEVADA

CARSON CITY, December 30, 1912.

Court convened at 10 o'clock a. m.

The committee heretofore appointed to draft appropriate resolutions expressing the sorrow of the Court and bar due to the death of Cleveland H. Baker, the Attorney-General of the State of Nevada, and the committee being present in court, Hon. H. F. Bartine presented the following:

IN MEMORIAM—CLEVELAND HALL BAKER

To the Honorable the Supreme Court of the State of Nevada:

The undersigned, to whom was delegated the duty of paying tribute to the memory of the late Attorney-General, CLEVELAND H. BAKER, beg leave to submit the following:

Struck down in the flower of his brilliant young manhood, with the brightest of worldly hopes before him, the death of CLEVELAND H. BAKER, Attorney-General of Nevada, cast a gloom over the entire State. In delicate health for two years past, but with no suggestion that the end was so near, on the 5th day of December, 1912, he died, literally in the arms of the devoted wife and widowed mother whom he loved so well.

Nothing could have been more serenely beautiful than the home life of the man whom the bench and bar of this State honor today. At his age most men have scarce reached the height of their early frolics and foibles, but to him the family circle was the dearest thing on earth. It was the sacred spot for which his heart ever yearned and which, when wearied with the cares of the day, in preference to all other places and associations, he sought as the shades of evening fell. His devotion to his young wife, who gave him the fullest measure of affection in return, to his gray-haired mother, and to his brothers and sisters, bespoke the true nobility of his character and endeared him to all who knew him as he was.

Afflicted with what to others appeared to be an incurable disease, not a murmur or a complaint escaped him. Cheerful, and even joyful, in his temperament, he shed rays of sunshine where'er he went, and he was the very life of any social gathering of which he formed a part. Highly educated along broad lines, and a careful student of law in its basic principles, he had, at the age of thirty years, already attained an enviable and honored standing in the profession of his choice.

CLEVELAND HALL BAKER

Mr. BAKER began his public career as District Attorney of Nye County, serving faithfully and efficiently for the term of two years. Elected in 1910 to the higher office of Attorney-General, he had already made a distinguished name for himself when the Grim Reaper called him away from all earthly duties. During the two years he held the office of Attorney-General he had grown and developed professionally in a most remarkable degree. His associates in office found him a safe and sure counselor, his opinions upon legal questions indicating a maturity of thought seldom observed in one so young. With ordinary health and strength it is reasonable to believe that soon he would have had few equals and no superiors in the bar of this State. Always kindly, always courteous, always conscientious in the discharge of his duties, he commanded the respect of all and the love of those who knew him best. Had he been permitted to live the usual span of human life, with physical strength on a par with his mentality, there is no honor and no distinction which he might not have attained. But while his mind, strong by nature and stronger by cultivation, maintained its clearness and even increased in power, his bodily strength failed day by day, little by little, until upon that fateful morning in December his heart and his brain both ceased their work and slept in silence together.

In the death of such a man as CLEVELAND H. BAKER we feel that the State has suffered an irreparable loss. On behalf of our bench and bar we wish to express as best we can our regret for the loss to the State, our sorrow for the loss to ourselves, and our tenderest sympathy for those who were nearest and dearest to him in his life, and whose own lives have been shadowed by the great bereavement they have sustained.

In lieu of the formal resolutions usually adopted in such cases, we ask that this expression be accepted as a performance of the duty assigned to us, and this feeble offering be printed in the next volume of the Supreme Court Reports of the State of Nevada.

GEO. B. THATCHER,
H. F. BARTINE.

The Court now replied and expressed its profound sorrow, respect and admiration of the deceased Attorney-General, Cleveland H. Baker, and thanking the committee for its appropriate memorial it ordered that the same be spread upon the minutes of the court, and that an engrossed copy be forwarded to the widow and to the mother of the deceased, and that the memorial be printed in the next volume of the Supreme Court Reports.

Attest: JOE JOSEPHS, *Clerk*.

In Memoriam

James Ray Indge

Died July 31, 1912

IN THE SUPREME COURT OF THE STATE OF NEVADA

CARSON CITY, August 2, 1912.

Court convened at 10 o'clock a. m.

Hon. Cleveland H. Baker, the Attorney-General, now addressed the Court upon the death of Hon. James R. Judge, late Deputy Attorney-General and an officer of the court. Upon motion of the Attorney-General the Court appointed the following committee to draft resolutions on the death of Hon. James Ray Judge as follows: Hon. Cleveland H. Baker, William Woodburn, and Samuel Platt.

IN THE SUPREME COURT OF THE STATE OF NEVADA

CARSON CITY, January 30, 1913.

Court convened at 10 o'clock a. m.

The committee heretofore appointed to draft appropriate resolutions for the court and bar on the death of Hon. James R. Judge, Deputy Attorney-General of the State of Nevada, consisting of Hon. Cleveland H. Baker, Hon. William Woodburn, and Hon. Samuel Platt, and it appearing that during the existence of this committee the Hon. E. T. Patrick notified this court of the death of the Hon. Cleveland H. Baker, one of the committee, therefore the Court, on the 16th day of December, 1912, appointed Hon. E. T. Patrick to act as a member of this committee in lieu of Cleveland H. Baker, deceased. Now, on this day, the full committee being present, Hon. Samuel Platt presented the following to the court:

Your committee appointed to draft and submit suitable resolutions upon the death of the late Hon. James R. Judge respectfully embodies as its report the following address delivered by the late Hon. Cleveland H. Baker, a member of your committee, before the Nevada Bar Association at its November session (1912) in Reno. Your committee not only presents the same as a fitting tribute to the memory of General Judge, but as a further testimonial of its high regard for the views and opinions and professional standing of the late lamented General Baker.

Respectfully submitted,

WILLIAM WOODBURN,
SAMUEL PLATT,
E. T. PATRICK,

Committee.

IN MEMORIAM—JAMES RAY JUDGE

The late JAMES RAY JUDGE was born in Altoona, Pennsylvania, September 9, 1850, and died in Carson City, Nevada, July 31, 1912, in the State which he loved and adopted, and which had so often honored and favored him.

Between these two dates lies the record of a life of useful service and application.

Growing to manhood in his native State, the close-calculating and analytical bent of his mind caused him to study civil engineering.

JAMES RAY JUDGE

After graduating from a college there, he left Pennsylvania and came out with a surveying party and intentionally located at Carson City in 1877.

He found immediate employment as a practical railroad man with the Virginia and Truckee Railroad, and later was placed in charge as a foreman of construction.

The outdoor work in the West having built up his health to a marked degree, he determined to take up uninterruptedly the study of law, a study for which he had always treasured a fondness, and to which during all his spare time as a railroad man and engineer he devoted himself.

In 1879 he entered the law office of the late Col. A. C. Ellis as a student. Under the direction of that distinguished lawyer he acquired a strong and firm foundation in legal principles, and on April 5, 1881, he was admitted to practice before the Supreme Court of this State.

In the law Mr. JUDGE's chief distinction lay as a close and careful pleader. His pleadings were drawn with all the care and caution of a scholar, for, as he once said, "A person's standing in court depends upon what he is standing on."

In 1892 he moved to Eureka, where he became associated in law with the late Judge Henry Reeves, who was acknowledged one of the brightest legal minds in the State.

However, with the price of silver declining and the mines of Eureka not being able to be worked profitably, business there did not reach expectations, and Mr. JUDGE returned again to Carson City and here he remained.

During his practice of law in the Capital City he was identified with some of the biggest and most important litigation that has come before our courts.

As one of the leading counsel for Governor Sadler in his election contest case, he ably and successfully defended his title to the office, and in that long-drawn-out struggle in which the foremost legal talent of the State challenged each other, he was conspicuous for his unfaltering zeal and close attention to the mass of detail involved in that suit.

While Mr. Woodburn was Attorney-General, Mr. JUDGE was appointed to assist him in the conduct of the important tax suits which were then pending against the Central Pacific Railroad, and since that time every case of any importance has usually found him allied on one side or the other.

On December 24, 1896, he was appointed Attorney-General by Governor Sadler to succeed the late Robert M. Beatty, who had died in office, and as Attorney-General he devoted his entire time to the affairs of the State, often being called upon for advice on matters of administration, and his official report is a splendid commentary upon the close attention and detail which he gave the affairs of his office, and his strong and well-reasoned opinions did much to guide the state officers through the many legal obstacles that arose.

In 1896 he served Governor Sadler for a time as his Private Secretary, and in the fall of that year, when silver was the keynote of one of the hardest campaigns ever waged in the interest of a Silver

JAMES RAY JUDGE

State, he rallied to its cause and as one of the standard-bearers of the Silver Party he was nominated and elected by a large majority to the office of Lieutenant-Governor.

By virtue of his election to this office he presided over the deliberations of the Senate during the Nineteenth and Twentieth Sessions, and as President of the Senate he made an admirable presiding officer by reason of his splendid equipment as a lawyer and a student of parliamentary law, and the close and intimate knowledge of the machinery and affairs of government which his former offices had made possible.

In 1893 he married Mrs. Della B. Upton in San José, California, who survives him.

After retiring from the office of Lieutenant-Governor in 1904, he devoted himself to the practice of his profession and accepted no public office until January, 1911, when he was appointed Deputy Attorney-General, which office he filled at the time of his death.

In the passing of General JUDGE the courts have lost one of the strongest exponents of the honesty and integrity of the bench; the bar one of its ablest pleaders and most courteous and obliging of counsel; the State a citizen who at all times stood ready and willing to serve in any capacity from the highest to the humblest, and whose most sacred duty was ever to be just and fair, and who, as Attorney-General and Lieutenant-Governor, by his every act and deed has added his name to his State's roll of honor.

From her who mourns him as a fond and affectionate husband may the Almighty, in his infinite wisdom and mercy, lift the burden of grief, and comfort the hearts of his fond and loving friends.

The Court now expressed its sorrow, respect and admiration of the deceased, James R. Judge, Deputy Attorney-General, and thanking the committee for the appropriate memorial, ordered that the memorial be spread in full upon the minutes of the court, that the Clerk of this Court forward an engrossed copy to the widow of the deceased, and that this memorial be printed in the next volume of the Supreme court Reports, and in further honor and respect, when this court adjourns, it will stand adjourned for the day.

Attest: JOE JOSEPHS, *Clerk.*

GENERAL INDEX

GENERAL INDEX

ABANDONMENT. See MINES AND MINERALS, 5, 24.

ABATEMENT. See MANDAMUS.

ACCOMPLICE. See CRIMINAL LAW, 16.

ACCOUNTANTS. See GRAND JURY.

ACCOUNTING. See BANKS AND BANKING, 9.

ADVERSE POSSESSION. See MINES AND MINERALS, 11.

AGENCY. See BANKS AND BANKING, 12, 13, 14; MINES AND MINERALS, 29.

APPEAL AND ERROR.

1. FINDINGS—CONFLICTING EVIDENCE.

A finding on conflicting evidence is conclusive upon appeal.
Indiana M. Co. v. Gold Hills Co., 158.

2. NOTICE OF APPEAL—FORM.

While it is better practice to direct notice of appeal to all of the parties who, under any circumstances, might have adverse interests on the appeal, under the statute, if notice be served upon the adverse parties, it is sufficient. *Douglass v. Thompson*, 196.

3. NOTICE OF APPEAL—TIME.

Where it is provided by statute that an appeal is taken by the filing and service of a notice of appeal, but that an appeal shall not be effectual unless an undertaking thereon is filed within five days thereafter, the failure to file the undertaking within the time prescribed does not prevent the filing of a new notice with an undertaking thereafter, providing the time to appeal has not expired. *Idem*.

4. STATUTES—REPEAL BY IMPLICATION.

Section 387 of the practice act, effective January 1, 1912 (Rev. Laws, 5329), provides that an appeal may be taken (2) from an order granting or refusing a new trial, or refusing to grant or dissolve an injunction, or refusing to appoint a receiver, or refusing to change the place of trial, and from any special order made after final judgment within sixty days after made and entered. The former practice act of 1869 (Stats. 1869, p. 248), sec. 330, provides that an appeal may be taken from an order "granting or dissolving an injunction and from an order refusing to grant or dissolve an injunction." The act approved January 26, 1865, sec. 6 (Rev. Laws, 4833), "concerning the courts of justice of this state and judicial officers," gives the supreme court jurisdiction of an appeal from an order "granting or refusing to grant an injunction or

APPEAL AND ERROR—Continued.

mandamus in a case provided for by law." *Held*, that section 387 did not impliedly repeal section 6 authorizing an appeal from an order granting an injunction, so that an appeal lies from such order. *State v. Ducker*, 214.

5. INJUNCTION—STAY BOND.

On appeal from a mandatory injunction requiring defendant to release water from its reservoir and permit it to flow down the stream so that plaintiff could use it, defendant was entitled, as a matter of right, to a stay of proceedings upon the injunction upon the filing of a proper stay bond. *Idem*.

6. DISMISSAL—GROUNDS—LACK OF CONTROVERSY.

An appeal will be dismissed upon proof by affidavit that there is no longer a controversy for determination. *Foster v. Jones*, 248.

7. FINAL ORDER—QUASHING SERVICE.

An order quashing personal service of summons, made on a nonresident defendant while within the state, was a final order from which an appeal would lie under civil practice act, sec. 383 (Rev. Laws, 5325). *Tiedemann v. Tiedemann*, 259.

8. FINDINGS BY TRIAL COURT—CONFLICTING EVIDENCE—REVIEW.

Findings of fact on conflicting evidence will not be reversed on appeal. *McStay Supply Co. v. Stoddard*, 284.

9. THEORY OF CAUSE—MISTAKEN REMEDY—QUESTION FIRST RAISED ON APPEAL.

Where a suit was tried by both parties on the theory that it was in equity, defendant could not object for the first time on appeal that the complaint stated a cause of action at law and that plaintiff had mistaken his remedy which was in equity instead of at law. *Idem*.

10. PETITION FOR REHEARING.

The questions raised for the first time on a petition for a rehearing will not be considered. *Gamble v. Silver Peak*, 319.

11. IDEM—JURISDICTION—JUDGMENT—ESTOPPEL.

It is a general rule that a jurisdictional question may be raised at any time. However, a party, by his conduct, may become estopped to raise such a question. Where a party has treated a judgment as final throughout the proceedings, applied for and obtained relief upon the assumption that such judgment was final, and upon appeal prayed for its affirmance or reversal, he will not thereafter be heard to question its finality. *Idem*.

12. IDEM—REPLY TO PETITION.

An appellant who has prevailed on appeal and obtained a reversal of the judgment and order appealed from, as prayed for, will not be heard for the first time on reply to a petition for a rehearing, to suggest that a further order be made directing the lower court to dismiss the action. *Idem*.

13. CONCLUSIVENESS OF FINDINGS—CONFLICTING EVIDENCE.

Findings of the lower court upon conflicting evidence are binding upon the supreme court. *Round Mountain Co. v. Sphinx Co.*, 392.

14. DISCRETIONARY RULING—GRANTING NEW TRIAL.

Orders of the trial court granting new trial for insufficiency of conflicting evidence will not be disturbed, in the absence of a clear abuse of discretion. *Goldfield Mohawk Co. v. Frances-Mohawk Co.*, 424.

15. FINDINGS.

Court's finding of facts on conflicting evidence is conclusive on appeal. *Girton v. Dantels*, 438.

See CRIMINAL LAW, 2, 9, 10, 11, 12, 14, 17, 19, 20; HABEAS CORPUS, 9; STATUTES, 9.

APPROPRIATIONS. See STATUTES, 1, 2.

BAGGAGE. See CARRIERS.

BALLOTS. See ELECTIONS.

BANKS AND BANKING.**1. BANKING BUSINESS—REGULATION—CONSTITUTIONALITY—POLICE POWER.**

The legislature may regulate the banking business, and penal statutes safeguarding the business of banking are applicable to banks organized previous to, as well as to banks organized after, their passage. *Eureka Bank Cases*, 80.

2. LIABILITY OF ASSENT OFFICER OF INCORPORATED BANK RECEIVING DEPOSITS—ASSENT—CONNIVANCE.

Where, under indictments and bench warrants under a statute making it a felony for any officer, director or person to accept or receive a deposit in any bank, when he knows or has good reason to know that the bank is insolvent, or for permitting, conniving at or assenting to the reception of deposits, it is sought to hold and punish directors and officers of a bank who are not residing in the county, and were not at the bank, and did nothing in regard to the receipt of deposits, on the assumption that, because they were such directors and officers, the inference would follow that they were receiving the deposits, assenting to and conniving at the reception of deposits which were being received by the bank through its cashier, they are entitled to be discharged because the statute nowhere by its terms provides any penalty against petitioners or persons for merely acting as directors or officers of a bank, whether solvent or insolvent, or when receiving deposits and insolvent, except officers or persons actually receiving deposits for the bank, knowing or having good reason to know that it is insolvent. *Idem*, 83.

3. RECEIPT OF DEPOSITS BY INCORPORATED BANK—KNOWLEDGE OF INSOLVENCY.

The receipt in a private bank of a deposit by the teller is the receipt by the private banker, because he is the principal, the teller, the agent, and the deposit is the banker's private property; but the receipt of a deposit in an incorporated bank by the teller is a receipt by the corporation and the deposit becomes the property of the incorporated bank, not of the teller or other officers of the bank; and the teller or

BANKS AND BANKING—Continued.

cashier actually receiving the deposit for an incorporated bank is not guilty of felony unless he knows, or has good reason to know, that the bank is insolvent, and he may not have the same knowledge regarding the value of the assets and the insolvency of the bank as the directors. *Idem*.

4. POWERS OF DIRECTOR OR OFFICER TO CLOSE INCORPORATED BANK.

A director or officer, when he is not specially authorized by the board of directors or stockholders, is not empowered to prevent the reception of deposits or to close a bank which has long been doing business and is receiving deposits, merely because he is such officer. *Idem*, 84.

5. OFFICER WITHOUT POWER TO CLOSE BANK—ASSENT TO DEPOSIT.

Under the provisions of the statute, that any bank officer having authority to close the bank or to prevent the reception of deposits, who does not exercise such authority when he knows the bank to be insolvent, shall be deemed to have assented to the reception of deposits, the officer is not guilty of assenting to the reception of deposits merely because he is such officer, when he has not been authorized to close the bank nor to prevent the reception of deposits, and is absent and does nothing in regard to the deposits. Under the statute, the assenting to the reception of deposits implies the power to withhold assent; and an officer who is without this power, and is absent and does not act in regard to the deposit, cannot be held guilty of assenting to the reception of a deposit. *Idem*.

6. GENERAL BANKING ACT OF 1909—HOW FAR REPEALED BY GENERAL ACT OF 1911.

The banking act of March 22, 1911, being a general and comprehensive act, working over and covering most of the features of the general banking act of March 24, 1909, and evidently intended as a substitute for it, repeals the provisions of that act by implication, except as specifically continued in force. *Idem*, 85.

7. REPEAL OF PROVISIONS IN BANKING ACT OF 1909 PENALIZING PUBLICATION OF FALSE STATEMENT.

Section 16 of the general banking act of March 22, 1911 (Stats. 1911, p. 297; Rev. Laws, 631), having remodeled and carried over most of the provisions of section 22 of the general banking act of March 24, 1909 (Stats. 1909, p. 257), and having omitted the provision of section 22 making it a felony to publish any false statement of the amount of the assets and liabilities of a banking corporation, and the later act being a general and comprehensive one, working over the provisions of the earlier act, the provision making it a felony to publish such a statement is repealed and no longer in force. *Idem*.

8. ACTION—NATURE OF REMEDY—EQUITY OR LAW.

Plaintiff sued defendant banking company and the firm of S. Bros., alleging that the firm had collected certain funds as plaintiff's agent and had wrongfully deposited them in the

firm account in defendant bank to which the firm was indebted, and that defendant bank, with knowledge of plaintiff's ownership of the money, wrongfully credited the same on the firm's debt, and refused on demand to pay the money to plaintiff, whereupon plaintiff prayed that it might be decreed to be the owner of the money, and that the bank be ordered to account therefor and pay it over. *Held*, that the facts alleged stated a cause of action in equity and not at law. *McStay Co. v. Stoddard*, 284.

9. ELECTION OF REMEDIES—ACCOUNTING—CONVERSION.

Where the agent of plaintiff wrongfully deposited money collected to the credit of the agent's account in a bank, and the bank, with knowledge of plaintiff's ownership, credited the money on the agent's debt to it, the plaintiff could either sue the bank in equity of an accounting or else treat the funds as converted, and sue for damages at law. *Idem*.

10. RELATION BETWEEN BANK AND DEPOSITOR.

The relation between a bank and its depositor is that of debtor and creditor, so that the title to money deposited passes at once to the bank and becomes a part of its general assets. *Idem*, 285.

11. BANK'S LIEN.

A bank has a lien on all funds belonging to depositors deposited for any indebtedness owing to it by them. *Idem*.

12. DEPOSITS BY AGENT—WITHDRAWAL—LIEN.

Where a principal permits his agent to deposit money in a bank without notice to the bank that the money belongs to the principal, and the agent checks out the money or subjects it to a lien on account of money borrowed from the bank, the loss is that of the principal and not of the bank. *Idem*.

13. DEPOSIT — BANK'S LIEN — MONEY BELONGING TO DEPOSITOR'S PRINCIPAL.

Where a principal permits his agent to deposit money to the credit of the agent's account in a bank, and neglects to give notice of ownership of the money until the bank's lien has attached for an indebtedness due from the agent, a notice thereafter given is too late and will not affect the bank's right to apply the money to satisfy its lien. *Idem*.

14. TRUST FUNDS—DEPOSIT BY AGENT—APPLICATION BY BANK.

Where an agent to collect and remit for claims belonging to plaintiff, without authority, deposited the proceeds of the collections to his deposit account in a bank to which he was indebted, plaintiff was the equitable owner of such proceeds, and the bank had no authority after notice to apply the same to the agent's debt to it. *Idem*.

BENCH WARRANT. See HABEAS CORPUS, 4.

CARRIERS.

1. BAGGAGE—LIMITATION OF LIABILITY.

If it be conceded that passenger carriers by specific rules which are reasonable, and not inconsistent with the statutes

CARRIERS—Continued.

or with their duties to the public, and which are distinctly brought to the knowledge of the passenger, may protect themselves against liability as insurers of baggage exceeding a fixed value except upon payment of an additional compensation proportioned to the risk, a contract so limiting the amount of liability does not relieve the carrier of liability for baggage lost through its negligence. *Zetler v. T. & G. R. R. Co.*, 381.

2. BAGGAGE—NEGLIGENCE—WRONG DELIVERY.

The delivery of a passenger's baggage at carrier's baggage room to a person not entitled to receive it is such negligence as makes the company liable, notwithstanding a contract limiting its liability to a fixed value. *Idem*.

CHILDREN. See ORPHANS' HOME.

CLERICAL ERRORS. See MINES AND MINERALS, 31, 32.

CONDEMNATION. See EMINENT DOMAIN; MINES AND MINERALS, 10.

CONFESSION. See CRIMINAL LAW, 18.

CONSTITUTIONAL LAW.**1. TAXATION — PATENTED MINING CLAIMS — ASSESSMENT — NET PRODUCTS.**

Article 10 of the constitution, as amended and ratified at the general election in 1906, provides (section 1) that the legislature shall provide for uniform and equal taxation and for a just valuation for taxation of all property, except mines and mining claims, when not patented, the proceeds alone of which shall be assessed and taxed; and, when patented, each patented mine shall be assessed at not less than \$500, except when \$100 in labor has been actually performed thereon during the year, in addition to the tax on the net proceeds, etc. Rev. Laws, 3621, provides that all property within the state shall be subject to taxation, except: "Second—Unpatented mines and mining claims; *provided*," etc. *Held*, that where \$100 worth or more of labor has been expended on a patented mining claim during any one year and prior to the time of assessment, the mine is exempt from taxation, except on the proceeds thereof. *Goldfeld Con. M. Co. v. State*, 178.

2. CONSTRUCTION.

In the construing of constitutions or statutes the intention of the convention or the legislature controls, to be determined in accordance with established rules. *Idem*.

3. INTERSTATE COMMERCE—STATE REGULATIONS—"ITINERANT MERCHANT."

Rev. Laws, 3890-3894, inclusive (Act approved March 24, 1905, sec. 1; Stats. 1905, c. 153), makes it unlawful for any itinerant merchant or peddler to offer goods for sale without first obtaining a license. Section 2 defines an itinerant merchant, etc., as one having no permanent place of business

within the state, which is not regularly located and taxed. Section 3 fixes the amount of the license required. Section 4 provides that the act shall not apply to drummers representing wholesale houses; and section 5 provides that it shall not apply to the sale of farm products. *Held*, that the act violated art. 1, sec. 8, of the constitution of the United States, relating to interstate commerce. *Ex Parte Taylor and Rounds*, 504.

4. LICENSES—EQUAL PROTECTION OF LAW.

The act violates the fourteenth amendment and article 4 of section 2 of the constitution of the United States, relating to equal protection of the laws. *Idem*.

See CRIMINAL LAW, 13; HABEAS CORPUS, 20.

CONTEMPT.

PROHIBITION.

Alleged violation of a void order of court does not constitute contempt of court, and prohibition will lie to prevent proceeding to punish for such alleged contempt. *McKinnon v. Harwood*, 494.

CONTINUANCE. See CRIMINAL LAW, 2.

CONTRACTS. See MINES AND MINERALS, 24-29; MORTGAGES; STATUTE OF FRAUDS.

CONVERSION. See BANKS AND BANKING, 9.

CONVEYANCE. See MINES AND MINERALS, 9.

CORPORATIONS. See BANKS AND BANKING.

COSTS.

RECOVERY—STATUTORY PROVISIONS.

Costs are recoverable only by express statutory provisions. *State v. Baker and Josephs*, 300.

See ELECTIONS, 16, 17, 18, 19, 20.

COUNTY COMMISSIONER. See HABEAS CORPUS, 18.

COURT COMMISSIONER. See ELECTIONS, 16.

COURTS.

1. JURISDICTION—IMPLIED ADJUDICATION.

It is a primal duty of all courts to keep strictly within their jurisdiction. In every affirmative action taken by a court, there is an implied adjudication of jurisdiction. *Gamble v. Silver Peak*, 319.

2. IDEM—IDEM.

A court should always take note of a suggestion of want of jurisdiction, notwithstanding the rule as to waiver or estoppel, where rights of third parties may be involved and may raise the question of its own motion. *Idem*.

See CONTEMPT; GRAND JURY; HABEAS CORPUS, 19; ORPHANS' HOME.

CRIMINAL LAW.

1. TRIAL—PENDING SENTENCE OF LIFE IMPRISONMENT.

Under Rev. Laws, 6908, 6921, 7459, providing that every person shall be liable to punishment for a public offense committed by him, that there is no limitation of the time within which a prosecution for murder must be commenced, and that, when it is necessary to have one imprisoned brought before a court, an order for that purpose may be made, one sentenced to life imprisonment for murder may be tried pending his incarceration for a murder previously committed, and in the event of his conviction thereof, and sentence to death, the sentence may be carried into execution, notwithstanding section 7256, providing that, where defendant has been convicted of two or more offenses before judgment on either, the judgment may be that the imprisonment on any one may commence at the expiration of the imprisonment on any other. *Ex Parte Trammner*, 56.

2. CONTINUANCE—DISCRETION OF TRIAL COURT.

A continuance in a criminal case is within the discretion of the trial court, and in the absence of an abuse of discretion its action will be sustained. *Idem*.

3. SPEEDY TRIAL—OBJECTIONS.

Where accused, indicted under two indictments for a double murder, did not object to a continuance of the trial under one indictment, pending his trial under the other, resulting in his conviction and sentence to life imprisonment, and did not apply for a speedy trial, he could not complain that he was not given a speedy trial. *Idem*.

4. SPEEDY TRIAL—OBJECTIONS.

Where accused, indicted under two indictments for a double murder, obtained a change of venue in the case of one indictment, but the other indictment was not removed, and at the next term of court the latter case was called for trial, and subsequently removed to another county on a change of venue, accused could not complain that he was not given a speedy trial under such indictment, as guaranteed by the constitution and Rev. Laws, 7396. *Idem*.

5. SPEEDY TRIAL—OBJECTIONS.

The statute guaranteeing a speedy trial does not apply while accused is in prison serving a sentence on another charge; but accused, serving such sentence, may demand that he be tried on all indictments against him, and a refusal to try him may enable him to invoke the statute. *Idem*, 57.

6. LEWDNESS—STATUTORY OFFENSE—INDICTMENT.

An indictment alleging that accused wilfully, unlawfully, and feloniously lived with a female named, the female being a common prostitute, charges the offenses denounced by Rev. Laws, 6445, punishing every person who shall live with a common prostitute. *State v. King*, 153.

7. INDICTMENT AND INFORMATION — STATUTORY OFFENSES — SUFFICIENCY.

An indictment charging an offense in the language of the statute on which it is based is sufficient, where the statute

sets forth, without uncertainty, the elements necessary to constitute the offense. *Idem*.

8. PROSECUTING ATTORNEY—ARGUMENT.

Remarks of the district attorney in argument based on the evidence in the case will not be regarded as improper. *Idem*.

9. APPEAL AND ERROR—ASSIGNMENTS, WHEN DISREGARDED.

Assignments of error not referred to in the briefs or oral argument do not require consideration. *Idem*.

10. APPEAL—HARMLESS ERROR—ADMISSION OF EVIDENCE.

Admission of improper evidence is not as a rule prejudicial, where subsequently withdrawn, with directions to the jury to disregard it. *State v. Urie*, 268.

11. TRIAL—APPEAL—CURING ERROR.

The court admitted accused's alleged confession in evidence, and afterwards, upon it appearing that it was made after the sheriff had told accused that it would be better for him to tell the truth, ordered the confession stricken and directed the jury to disregard it, and also instructed that the jury must not consider any evidence stricken by order of the court, but must decide the case solely upon the evidence actually given and allowed. *Held*, that any error in admitting the confession in evidence was cured by the court's action. *Idem*.

12. APPEAL—HARMLESS ERROR—ADMISSION OF EVIDENCE.

Any error in admitting an alleged confession in evidence could not have prejudiced the accused where he testified to substantially the same facts stated in the confession. *Idem*.

13. WITNESSES—WAIVER OF CONSTITUTIONAL PRIVILEGE.

When accused waives his constitutional privilege not to testify, and becomes a witness for himself, he cannot testify to that part of the transaction favorable to himself and claim his privilege as to the remainder. *Idem*.

14. APPEAL—ASSIGNMENTS OF ERROR—FAILURE TO DISCUSS.

Accused's counsel waived assignments of error not discussed in his brief. *Idem*.

15. GRAND JURY—GRAND JURORS—QUALIFICATION—OPINION.

Section 7005, Rev. Laws, provides that a grand juror may be disqualified when a state of mind exists on his part with reference to the case, or to either party, which will prevent him from acting without prejudice to the rights of the challenging party, but that no person is disqualified as a grand juror by reason of having formed or expressed an opinion on the matter submitted, founded on public rumor, statements in the public journals, or common notoriety, provided that it appears by his oath or otherwise that he will, notwithstanding such opinion, act impartially on the matters submitted to him. *Held*, that a grand juror, who had formed a belief or opinion from statements made to him that defendants were keeping a gambling place, was not disqualified where he further testified that his opinion was not such as would justify him in making a charge against accused. *State v. Williams*, 276.

16. ACCOMPLICES—CORROBORATION.

In a prosecution for permitting unlawful gambling in the defendant's place of business, evidence that other unlawful

CRIMINAL LAW—Continued.

games were played there, and that the game in question, as testified to by the participants and other witnesses, was carried on with the door locked and attended by defendant's brother, furnished sufficient corroboration of the testimony of accomplices required by section 7180, Rev. Laws, to sustain a conviction. *Idem*.

17. TRIAL—MISCONDUCT OF ATTORNEY—DEFENDANT'S FAILURE TO TESTIFY—REFERENCE.

In a prosecution for permitting gambling on defendant's premises, a statement by the district attorney in argument, "Why didn't the defendant call any witnesses to the stand? Why didn't he put his brother on the stand, his attendant? * * * I will tell you why; he didn't dare do it," was not objectionable as a reference to defendant's failure to testify in his own behalf. *Idem*.

18. EVIDENCE—CONFESSION—NECESSITY OF CAUTION.

Voluntary statements made by accused while in custody, without the use of force, threats, inducements, or promises, or hope of reward, were not inadmissible in evidence merely because he was not first informed that they might be used against him; there being no statutory provision in this state that confessions shall not be admitted unless it appears that accused was warned that what he should say might be used against him. *State v. Mircovich*, 485.

19. APPEAL—HARMLESS ERROR.

Where evidence showed conclusively and was undisputed that the accused killed deceased with a knife, the admission of his statements as to his possession of the knife by which deceased was killed, even if erroneous because he was not warned that they might be used against him, did not require a reversal in view of Rev. Laws, 7302, requiring the court, after hearing the appeal, to give judgment without regard to technical error or defect not affecting the substantial rights of the parties, and section 7469 providing that no judgment shall be set aside or new trial granted on the ground of misdirection of the jury or improper admission or rejection of evidence, or for error as to any matter of pleading or procedure, unless the court, after an examination of the entire case, is of the opinion that the error has resulted in a miscarriage of justice or has actually prejudiced the defendant in respect to a substantial right. *Idem*.

20. TRIAL—ARGUMENT OF COUNSEL.

A remark of the district attorney in arguing in favor of the death penalty that if the jury could not pronounce by their verdict the death penalty upon defendant, "Let's resurrect old Casey that killed Mrs. H. and let him live again," without stating the facts in regard to the commission of the crime for which Casey was hanged, and evidently with the assumption that the jurors were aware of the punishment suffered by him, was not beyond the bounds of legitimate argument. *Idem*.

21. TRIAL—ARGUMENT OF COUNSEL.

On a trial for murder, where there was evidence that accused had stated that he was an anarchist, a reference to him by the district attorney in his argument as an anarchist was not prejudicial error. *Idem*, 486.

22. TRIAL—ARGUMENT OF COUNSEL.

Prosecuting attorneys are not justified in their argument in accusing a defendant with being guilty of offenses against the statutory or moral law, as to which there is no evidence; mere abuse or the application of vile epithets not being proper argument. *Idem*.

23. TRIAL—ARGUMENT OF COUNSEL.

On a trial for murder, where a witness for the state on cross-examination had denied he had advocated "swinging" accused, but admitted that he thought that the crime was such that the county should be saved the expense, it was not error for the district attorney to refer to such testimony as an argument in favor of the death penalty. *Idem*.

See **BANKS AND BANKING**, 2-7; **HABEAS CORPUS**.

DEED. See **MINES AND MINERALS**, 9.

DEPENDENT CHILDREN. See **ORPHANS' HOME**.

DESCRIPTION. See **MINES AND MINERALS**, 9.

DISMISSAL. See **APPEAL AND ERROR**, 6.

DISTRICT JUDGE. See **HABEAS CORPUS**, 19; **ORPHANS' HOME**.

ELECTIONS.**1. QUO WARRANTO—ELECTION CONTESTS—BALLOTS AND ELECTION RETURNS—ADMISSIBILITY IN EVIDENCE.**

Rev. Laws, 5409, which provides that a public record in the custody of a public officer in a public office may be admitted in evidence by the certificate of the custodian that it is genuine, affects the admissibility of the specified character of evidence, but not the method of the production thereof in court, and the supreme court in *quo warranto* involving an election contest has no authority to direct the county clerk of a county to certify to the court the ballots and election returns of the precincts of the county for the election. *State v. Baker and Josephs*, 1.

2. BALLOT BOX—CERTIFICATE OF COUNTY CLERK—SUFFICIENCY.

A certificate of the county clerk of a county attached to a ballot box of a precinct in the county, which recites that he certifies that to the best of his knowledge and belief there are within the ballot box, so inclosed that it cannot be opened without destroying the certificate, the ballots cast at an election and the election returns, and that to the best of his knowledge and belief the ballots and returns are genuine, does not comply with the statutory requirements because it fails to show that the box and its contents were in his custody and in his office, or that the box and its contents are the genuine

ELECTIONS—Continued.

and authentic election records and documents of the precinct, and the ballot box is inadmissible in an election contest. *Idem.*

3. BALLOT BOX—CERTIFICATE OF COUNTY CLERK—SUFFICIENCY.

Rev. Laws, 1795, providing for the deposit of ballots and election returns in the office of the clerk of county commissioners, and that they shall not be subject to the inspection of any one except in cases of contested elections, and then only by the judge or body before whom the election is contested, is not repealed by a subsequent statute embodied in section 5409, providing that a public record in a public office may be admitted in evidence by the certificate of the custodian, and ballots must remain in the custody fixed by law except when their removal is authorized by some court, and ballots are not admissible in evidence in an election contest under the certificate of the clerk when they have been out of his official custody subsequent to the making of the certificate, at least in the absence of a proper foundation for their admission having been laid. *Idem.*

4. BALLOTS—CERTIFICATE OF CUSTODIAN OF PUBLIC RECORD—STATUTES—"PUBLIC DOCUMENTS."

Under Rev. Laws, 1795, providing for the deposit of ballots and election returns in the office of the clerk of county commissioners, and declaring that ballots so deposited shall not be subject to the inspection of any one except in cases of contested elections, and then only by the judge or body before whom the election is contested, ballots and election returns duly deposited are public documents within section 5409, providing that a public document in the custody of a public officer may be admitted in evidence by the certificate of the custodian thereof that it is genuine and authentic. *Idem.*

5. PRIMARY ELECTIONS—INDEPENDENT NOMINATIONS—PARTY DESIGNATION.

Under Rev. Laws, 1737, providing for the nomination of candidates for public offices by direct vote or by nominating petitions, and sections 1835, 1836, providing that nominations made by any convention shall be certified by a certificate containing the name of each person nominated, and the designation of the party or principle which the convention represents, and providing that a certificate of nomination shall contain the name of the candidate to be nominated with the other information required in the certificate of nominating conventions, the names of candidates nominated by petition are entitled to go on the official ballot with the designation of the party named in the certificate of nomination, and where a certificate of nomination for state offices, United States senator, representative in Congress, and presidential electors designates the candidates as the nominees of the Progressive party, the secretary of state may not certify the candidates as independent, but must certify them as the candidates of the Progressive party. *State v. Brodigan*, 35.

6. PRIMARY ELECTION—BALLOTS—RECOUNT—STATUTES.

Rev. Laws, 1513, provides that the board of county commissioners shall act as a board of canvassers, and declare the

general election returns, and that, when it shall appear from such canvass that any legislator, county or township officer voted for at such election has received a majority of ten votes or less, in such case, on the application of the defeated candidate, setting forth under oath that he has reason to believe that a mistake or mistakes have occurred on the part of the inspectors of the election in any election precinct or precincts, sufficient to change the result so far as the particular office is concerned, it shall be the duty of the board of county commissioners to immediately recount the ballots. This section was made applicable to primary elections by the primary election law of 1911, c. 167, sec. 14, amending Stats. 1909, c. 198, sec. 31. *Held*, that section 1513 did not authorize a recount before the courts, but left the parties free without a recount by the board to initiate such contests in the courts as might otherwise be prescribed by law. *Brown v. Dunn*, 166.

7. PRIMARY ELECTION LAW—CONTEST—AFFIDAVIT.

Rev. Laws, 1763, provides that whenever it shall be made to appear by affidavit to any justice of the supreme court or judge of the district court of the proper county that an error or omission has occurred or is about to occur in the placing of any name on an official primary election ballot, or that any wrongful act has been or is about to be done by any officer or board charged with any duty concerning a primary election, etc., such justice or judge shall order the officer or person charged with the error to desist from the wrongful act or perform the duty or forthwith show cause why he should not do so. Section 1764 declares that any candidate at a primary election desiring to contest the nomination of another candidate for the same office may proceed by affidavit within five days after the completion of the canvass and the contestees shall be required to appear and abide the further order of the court. *Held*, that where a contestant for the nomination for justice of the peace in a township claimed that he was deprived of the nomination by mistakes in counting the ballots in certain precincts, he was entitled to initiate a contest by affidavit before the district court under such sections, regardless of his right to a recount by the board of county commissioners as is provided for by section 1513. *Idem*, 167.

8. CONTEST—PRIMARY ELECTIONS—PROCEDURE.

Rev. Laws, 1764, providing that any candidate at a primary election desiring to contest the nomination of another candidate for the same office may proceed by affidavit, etc., was a special law relating to primary election contests, which control as to them, the provisions of the civil practice act requiring that there shall be but one form of action and for the requisites of a complaint therein. *Idem*.

9. PRIMARY ELECTION—CONTEST—OFFICIAL RETURNS.

Where a primary election contestant attacks the returns in more precincts than can be recounted within the period limited under the primary law, the original returns will stand under the presumption that they are correct, in precincts where the ballots are not recounted. *Idem*.

ELECTIONS—*Continued.*

10. PRIMARY ELECTION — CONTEST — AFFIDAVIT — FORM — NAMES OF PARTIES.

An affidavit initiating a primary election contest was not fatally defective because it did not name the parties to the contest in a title or heading, where the body of the affidavit clearly showed who were the parties in interest. *Idem.*

11. PRIMARY ELECTION—CONTEST.

An affidavit initiating a primary election contest alleging that the petitioner had reason to believe, and did believe, that mistakes had occurred in counting ballots in specified precincts sufficient to change the result of the election, was sufficient to secure a recount before a judge of the district court. *Idem.*

12. PRIMARY ELECTION—CONTEST—PETITION—PRAYER.

An affidavit for a primary election contest before a judge of a district court, praying that all the ballots cast in the precincts objected to for the particular office might be recounted, and for such further relief as the court might seem meet and proper, was sufficient. *Idem.*

13. NOMINATION BY CERTIFICATE—QUALIFICATIONS OF SIGNERS.

Under the act of March 13, 1891 (Stats. 1891, p. 40, sec. 4; Rev. Laws, 1836), which provides for nomination of candidates for public office by filing a certificate signed by electors, and under section 6 (Rev. Laws, 1838), which provides that no one shall join in nominating more than one nominee for each office to be filled, a certificate signed by the requisite number of electors is not vitiated by signers subsequently signing another certificate nominating another person for the same office, but duplicate signatures are invalid as to the subsequent certificate. *State v. Harmon*, 189.

14. QUO WARRANTO—ELECTION CONTESTS—JURISDICTION.

The court has jurisdiction to allow a writ of *quo warranto* on the relation of a defeated candidate for a state office to contest the election. *State v. Baker and Josefs*, 300.

15. QUO WARRANTO — CONTESTS — APPOINTMENT OF COMMISSIONER — JURISDICTION OF COURT.

Under Comp. Laws, 3279, 3280, authorizing the court to direct a reference when necessary for the information of the court, etc., the court, in *quo warranto* to contest an election to a state office, has jurisdiction to appoint a commissioner to count the undisputed ballots and report to the court for its information the actual ballots in dispute as well as the fact and number of undisputed ballots. *Idem.*

16. COMPENSATION OF COMMISSIONER APPOINTED BY COURT.

The compensation due the commissioner, appointed by the supreme court in an election contest to count the ballots which are undisputed and report the actual ballots in dispute, may be taxed as costs against the defeated party; but the court may not order relator to pay the costs in advance, though the commissioner may withhold his report until payment is made by the party calling for it, and any compensation advanced by either party to receive and use the report will be recovered as other costs from the losing party. *Idem.*

17. CLERKS OF COURTS—COSTS IN SUPREME COURT—STATUTORY PROVISIONS.

The fees of the clerk of the supreme court prescribed by Comp. Laws, 2469, allowing a fee for entering any motion, rule, or order, and a fee for filing each paper, are limited to orders and motions defined by section 3588, providing that every direction of the court made or entered in writing and not included in the judgment is an order, and an application for an order is a motion, and an offer of or objection to evidence, or a ruling admitting or rejecting evidence, or the routine adjournment of the trial, is not a motion and order, and the clerk may not recover fees therefor. *Idem*, 301.

18. COSTS—LIABILITY—PRIMARY LIABILITY.

Each party to an appeal or proceeding in the supreme court is primarily liable for the costs made by him, and there is no statutory authority for the charging to relator or appellant, or requiring the payment by them before judgment, of fees incurred by respondent. *Idem*.

19. COSTS—COSTS IN SUPREME COURT.

Where costs are incurred on both sides on appeal or original proceeding, the clerk must collect his costs in advance from the respective parties incurring them. *Idem*.

20. CLERKS OF COURTS—COSTS IN SUPREME COURT—FEES OF CLERK.

The clerk of the supreme court in an original proceeding must on request issue subpoenas, and fees therefor will be disallowed unless the party against whom the charge is made applied for and obtained a written order for the subpoenas. *Idem*.

21. CONTESTS—BALLOTS AS EXHIBITS.

A party to an election contest may attach all ballots in the same precinct to which he objects and have them filed as one exhibit, but the ballots of each precinct should be kept entirely separate. *Idem*.

22. BALLOTS—MARKING BALLOTS.

Under Rev. Laws, 1858, providing that when a voter marks more names than there are persons to be elected to office, or where it is impossible to determine his choice for any office, his vote for the office shall not be counted, a ballot containing a cross after the names of the candidates for the same office cannot be counted for either. *Idem*.

23. BALLOTS—MARKING BALLOTS.

Under Rev. Laws, 1852, which provides that the voter shall prepare his ballot by stamping a cross in the square, and in no other place, after the name of the person for whom he intends to vote, the cross must be in the square after the name of the candidate, and a ballot with a cross after the name of the candidate and before the square is invalid. *Idem*.

24. BALLOTS—MARKING BALLOTS.

Under Rev. Laws, 1852, which provides that in case of a constitutional amendment submitted the cross shall be placed after the answer which the voter desires to give, the cross in voting for or against a constitutional amendment need not be

ELECTIONS—Continued.

placed in the square, and a ballot with a cross before the square and after the word "Yes" or "No" in voting on a constitutional amendment is valid, as is also a ballot in which a single cross is placed in the square. *Idem*.

25. BALLOTS—MARKING BALLOTS.

A ballot containing a cross placed in the square and another cross placed before the square and after the word "Yes" or "No" in voting on a constitutional amendment must be rejected because of the extra cross. *Idem*, 302.

26. BALLOTS—MARKING BALLOTS.

Under Rev. Laws, 1858, providing that any ballot on which appears names or marks excepting as provided for shall not be counted, a ballot containing a cross in the square following a blank space left for filling in the name of a candidate for an office for which no candidate has been nominated, or containing the name of a candidate written by the voter, must be rejected. *Idem*.

27. BALLOTS—MARKING BALLOTS.

Ballots containing crosses made with lead pencil or pen, or by marking with the wrong end of the stamp, must be rejected. *Idem*.

28. BALLOTS—MARKING BALLOTS.

A ballot containing an erasure destroying the texture of the paper, or containing holes rubbed or torn through the paper by the voter, must be rejected. *Idem*.

29. BALLOTS—MARKING BALLOTS.

A ballot containing marks other than those required for voting, apparently designed for identification, or which may be readily used for that purpose, will not be counted. *Idem*.

30. BALLOTS—FAILURE TO TEAR OFF NUMBER.

A ballot from which the number has not been torn by the election officers is valid. *Idem*.

EMINENT DOMAIN.**PARTIES—INTERVENTION.**

Persons claiming interest in land sought to be condemned, and for that reason claiming an interest in the award made, were expressly authorized to intervene by Stats. 1907, c. 128, sec. 8, providing that all persons in occupation of or having or claiming an interest in any of the property described in the complaint, or in the damages for the taking thereof, though not named, may appear, plead, and defend, each in respect to his own property or interest or that claimed by him, in like manner as if named in the complaint. *L. V. & T. R. R. v. Summerfield*, 229.

See MINES AND MINERALS, 10.

EQUITY. See APPEAL AND ERROR, 9; BANKS AND BANKING, 8; MINES AND MINERALS, 8, 20, 26, 27, 28, 29.

ESTATES OF DECEASED PERSONS. See MECHANICS' LIENS, 3.

ESTOPPEL. See **APPEAL AND ERROR**, 11; **MINES AND MINERALS**, 27.

EVIDENCE. See **APPEAL AND ERROR**, 1, 8, 13, 15; **CRIMINAL LAW**, 10, 11, 12, 13, 16, 18; **ELECTIONS**, 1-4; **HABEAS CORPUS**, 1, 2, 3, 5, 7, 10, 11, 12, 15; **MINES AND MINERALS**, 13, 14, 22; **MORTGAGES**, 2.

FINDINGS. See **APPEAL AND ERROR**, 1, 8, 13, 15.

FORFEITURES.

PENALTIES.

Penalties and forfeitures are not favored, unless plainly expressed. *State v. Harmon*, 189.

See **MINES AND MINERALS**, 6.

GAMBLING. See **CRIMINAL LAW**, 16, 17.

GENERAL LAND OFFICE. See **MINES AND MINERALS**, 16, 19, 21.

GRAND JURY.

1. **POWERS OF GRAND JURY—PUBLIC OFFICERS—PRESUMPTION.**

Rev. Laws, 7028, 7029, respectively, require the grand jury to inquire into the wilful and corrupt misconduct of public officers, and provide that they may examine all public records, while section 1508 imposes on the board of county commissioners the duty of auditing the accounts of all officers. Sections 4148 and 4153 provide for the appointment of a state auditor who shall at the direction of the governor examine the books and accounts of all county officials. *Held* that, there being a presumption that public officers performed the duties required of them by law, the grand jury cannot hire an accountant to examine the books of county officials; it being their duty, in case there is reason to believe that the books of the county should be audited, to request either the board of county commissioners or the governor to provide for such audit. *Stone v. Bell*, 240.

2. **POWERS OF JUDGE—PRIVATE ACCOUNTANT.**

The grand jury being without statutory authority to hire an accountant to audit the books of county officers, the district judge, though required by Rev. Laws, 4924, to charge grand juries as to their duties, part of which section 7028 provides shall be an inquiry into the wilful and corrupt misconduct of public officers, has no inherent authority to engage a private accountant to examine and audit the books of all county officers; it not appearing that there was any reasonable ground to believe that such officers were guilty of misconduct. *Idem*.

See **CRIMINAL LAW**, 15; **HABEAS CORPUS**, 7, 11, 16, 18, 21.

HABEAS CORPUS.

1. **DISCHARGE FROM ARREST UNDER WARRANT OR INDICTMENT—EXCESS OF JURISDICTION—CASE NOT ALLOWED BY LAW—WANT OF PROBABLE CAUSE—TAKING EVIDENCE.**

Under the clear provisions of the *habeas corpus* act (Rev. Laws, 6239, 6241, 6242, 6243, 6245), directing that the judge

HABEAS CORPUS—Continued.

before whom a writ of *habeas corpus* is returned, shall "proceed to hear and examine the return, and such other matters as may be properly submitted," and "in a summary way to hear such allegations and proof as may be produced against such imprisonment or detention, or in favor of the same, and to dispose of such parties as the justice of the case may require"; and that "such judge shall have full power and authority to require and compel the attendance of witnesses by process of subpoena and attachment, and to do and perform all other acts and things necessary to a full and fair hearing and determination of the case," and "to discharge such party if no legal cause be shown"; that "if it appears on the return of the writ that the prisoner is in custody by virtue of process from any court * * *, or judge or officer thereof, such prisoner may be discharged, * * * first, when the jurisdiction of such court or officer has been exceeded * * *; fourth, when the process, though proper in form, has been issued in a case not allowed by law * * *; sixth, where a party has been committed on a criminal charge without reasonable or probable cause," the warrant of a committing magistrate and the bench warrant under an indictment are not final judgments, nor conclusive, and the judge or court hearing an application for a writ of *habeas corpus* may take or hear evidence against the warrants and indictment, and may discharge the accused when the magistrate, grand jury or court have exceeded their jurisdiction, when the process has been issued in a case not allowed by law, or when the party has been committed on a criminal charge without reasonable or probable cause. *Eureka Bank Cases*, 80.

2. FINAL JUDGMENT OF COMPETENT COURT OF CRIMINAL JURISDICTION—EVIDENCE—DISCHARGE OF ACCUSED.

The provision in Rev. Laws, 6244, that it shall be the duty of the "judge to remand the party if it shall appear that he is detained in custody by virtue of a final judgment or decree of any competent court of criminal jurisdiction," implies that he may be discharged in other cases if it appears from the evidence that there is no ground for detaining him. The warrant of the committing magistrate and the bench warrants issued under the indictment are not final judgments, nor conclusive under the provisions of the *habeas corpus* act. *Idem*.

3. WANT OF PROBABLE CAUSE—WHEN PERSON BOUND OVER WILL BE DISCHARGED.

It is a well-recognized rule that any person charged with felony and bound over by a committing magistrate will be discharged when there is no probable cause for believing that he is guilty of any offense. *Idem*.

4. INDICTMENT—BENCH WARRANT—WHEN ACCUSED ENTITLED TO DISCHARGE.

Under the provisions of the *habeas corpus* act, persons held under an indictment and bench warrant issued under it, are entitled to be released when it is undisputed and clearly appears that they have committed no act which the law

declares to be criminal, or if they are held in a case not allowed by law. *Idem*.

5. CONCLUSIVENESS OF INDICTMENT ON HABEAS CORPUS PROCEEDINGS—LACK OF EVIDENCE TO SUSTAIN INDICTMENT OR SHOW GUILT—BURDEN OF SHOWING LACK OF EVIDENCE.

The indictment is strong presumptive evidence of the truth of the allegations, but it is not conclusive against the objection that the court is without jurisdiction; and the court may consider the evidence and the real facts, the burden of showing which, clearly, in order to overcome the indictment, is upon the petitioners. Unless it appears that no evidence for the consideration of the trial jury can be supplied, indicating that the accused committed the crimes for which they are charged, or if the state can produce any evidence which would support the material allegations of the indictments and sustain a conviction, the indictments would be conclusive to the extent of requiring remanding to custody of the accused for trial, no matter how much evidence the accused may have tending to prove innocence. *Idem*.

6. LACK OF CRIMINAL JURISDICTION IF ACTS DO NOT CONSTITUTE CRIME.

Acts which the law declares to be criminal are the only ones which constitute crime, or for which a criminal court has jurisdiction to try an accused person. Prosecuting officers and law-abiding citizens cannot properly demand the conviction or prosecution of persons for the commission of other acts. If they could, no citizen, not even the law-abiding, would be safe. The district court is without original jurisdiction of misdemeanors triable in the justice's court, and the justice's court is without jurisdiction to try felonies which are triable only in the district court, and both are without jurisdiction to try an accused person for acts which are neither felonies nor misdemeanors, and which do not constitute crime. When a court attempts to punish for the commission of acts which are not criminal by law it goes beyond its jurisdiction into the domain of legislation, which is committed exclusively to another department of government. *Idem*, 82.

7. GRAND JURY—POWER TO INDICT.

It is the commission of an offense within the county which gives the grand jury authority to indict. Under Rev. Laws, 7020, "the grand jury must inquire into all public offenses committed and triable in the jurisdiction of the court." Under sections 7012 and 7013 the foreman and members of the grand jury are required to take an oath to present all offenses "committed and triable within this county of which you shall have or can obtain legal evidence"; and under section 7026, indictment should be found "when all the evidence * * * taken together is such as * * * would, if unexplained or uncontradicted, warrant a conviction by the trial jury." Under these statutory provisions the grand jury has not power to indict without evidence of commission of an act constituting a criminal offense in the county, which would sustain a conviction by a trial jury. *Idem*.

HABEAS CORPUS—*Continued.*

8. PENAL LAWS—CERTAINTY.

Criminal laws must be plainly written, so that every person may have an opportunity to know with certainty what acts or omissions constitute crime. *Idem.*

9. WRIT NOT DESIGNED TO INTERFERE WITH JURISDICTION OF COURTS OR MAGISTRATES, OR TO TAKE THE PLACE OF APPEAL—WHEN WILL ISSUE.

The writ of *habeas corpus* is not designed to interfere with the jurisdiction of any court, nor with the functions of committing magistrates or trial judges in determining as to the guilt of persons charged against whom there is evidence indicating that they have broken the law, nor is it designed to take the place of an appeal. It will seldom issue, but under the constitutional provisions guaranteeing liberty to the citizens and giving the right to the writ, it ought to issue in every case for the discharge of persons accused when it is clear and undisputed that the acts for which they are held are not criminal. *Idem.*

10. DISCHARGE UNDER A WRIT OF HABEAS CORPUS—FAILURE OF STATE TO DENY OR DISPROVE EVIDENCE THAT PETITIONERS WERE NOT IN THE COUNTY AND COMMITTED NO OFFENSE.

When on the hearing of the application for the writ of *habeas corpus* the prosecuting witness testifies that he does not know that certain of the petitioners were in Eureka County, and there is positive evidence on their behalf, uncontradicted, that they were not there, and the attorney for the state declined to make any admission, a failure to deny or offer any testimony against the evidence submitted by the petitioners, or to claim that the state could produce any contrary evidence upon a trial, is equivalent to an admission. In view of this, and other undisputed evidence that the petitioners committed no act which is made criminal and punishable in Eureka County, they are entitled to be restored to liberty under the constitutional right to the writ of *habeas corpus*. *Idem*, 83.

11. NEW ALLEGATIONS IN NEW INDICTMENTS WITHOUT EVIDENCE—WHEN DO NOT GIVE JURISDICTION.

Bringing new indictments after the petitioners have been discharged on *habeas corpus*, and adding or omitting words in the charging part which cannot be supported by any evidence, does not bring the accused within the jurisdiction of the court, if evidence be heard as directed by the statute and the undisputed facts show that petitioners were not within the jurisdiction of the court and committed no act which the legislature has made punishable. Alleging that they received deposits when the evidence is clear that they were not in the county, nor at the bank, does not give the court jurisdiction to try them, when the statute provides no penalty for their acting as directors and officers of the bank, even if it was insolvent, and when the *habeas corpus* act directs that testimony be heard and petitioners discharged if it is sought to hold them in a case not provided by law. *Idem*, 84.

12. SECOND INDICTMENT—PRESUMPTION—PROOF OF LACK OF EVIDENCE TO SUSTAIN ALLEGATION.

The presumption that the allegations of an indictment, and of a second indictment, are correct, in the absence of any testimony, may be overcome by clear proof on the part of the accused, uncontradicted by the state, indicating that there is not evidence to sustain the material allegations. *Idem*.

13. LACK OF EVIDENCE AND JURISDICTION—DISCHARGE BEFORE TRIAL TO PREVENT INJUSTICE.

Although no expense, however great, ought to prevent the trial of persons properly charged, against whom there is evidence to sustain a conviction, if it is clear that there is no evidence to sustain a conviction for any offense within the jurisdiction of the court, the accused ought to be discharged before trial to prevent injustice, hardship and expense to them and to the county. *Idem*.

14. QUASHING INDICTMENT—LATENT DEFECT.

Upon a motion to quash, a court can go behind an indictment regular upon its face and determine that it is void for any latent defect. *Idem*, 85.

15. QUASHING INDICTMENT FOR LACK OF EVIDENCE OR FOR PREJUDICE.

In extreme cases, when the court can see that the finding of an indictment is based upon such insufficient evidence as to indicate that the indictment resulted from prejudice, or was found in wilful disregard of the rights of the accused, the court should quash the indictment. *Idem*.

16. LACK OF JURISDICTION TO INDICT UNDER REPEALED STATUTE—RELEASE ON HABEAS CORPUS.

The court is without jurisdiction to hold for trial and convict the accused under the provision of an act which has been repealed, and when held for an act which is no longer criminal they are entitled to be discharged upon *habeas corpus*. *Idem*.

17. SWEARING TO FALSE REPORT, OR OTHER CRIMINAL ACT, WHERE PUNISHABLE.

Knowingly subscribing or swearing to a false report and other acts by an officer, director, proprietor, agent or clerk of a bank are punishable in the county where the report was subscribed or sworn to or the acts committed. *Idem*.

18. ASSISTANCE OF BLIND COMMISSIONER IN DRAWING GRAND JURY—VALIDITY OF INDICTMENT—PRESUMPTION THAT OFFICERS DO DUTY.

The fact that a county commissioner who was blind assisted in selecting the members of the grand jury is not a ground for setting aside an indictment. As with officers, the presumption is that he did his duty, and, in the absence of any showing to the contrary, it must be assumed that the clerk and judge in drawing and certifying to the grand jury did theirs. *Idem*.

19. PREJUDICE OF DISTRICT JUDGE—SETTING ASIDE INDICTMENT ON HABEAS CORPUS.

Under the contention that denunciation at a public meeting, in the public press, and in court, of the officers of a bank, by

HABEAS CORPUS—Continued.

the district judge who ordered and assisted in drawing the members of the grand jury and presided at the time the indictments were found is cause for setting them aside: *Held*, that generally the prejudice of the judge or bias of the grand jury is not ground for setting aside indictments by writ of *habeas corpus*. Whether the bias of a judge may be so extreme in any case as to warrant the setting aside of an indictment or discharge on *habeas corpus* of indicted persons on the theory that the constitution entitles the citizen to release in such a case, not determined. *Idem*, 86.

20. CONSTITUTIONAL QUESTIONS—WHEN NOT DETERMINED.

It is the rule that constitutional questions will not be determined unless the determination is necessary for the disposition of the case. *Idem*.

21. SETTING ASIDE INDICTMENT—BIAS OF GRAND JUROR.

Under sections 7090 and 7005 of the Revised Laws, the indictment may be set aside by the court in which the defendant is arraigned, upon motion, when the defendant has not been held to answer before the finding of the indictment, on the ground that a state of mind exists upon the part of the grand juror which would prevent him from acting impartially and without prejudice. *Idem*.

22. DISCHARGE—REHEARING.

After an order in a *habeas corpus* proceeding discharging the prisoner, a rehearing will not be granted, since this would suspend the former order and result in the rearrest of the prisoner, contrary to the express provisions of the *habeas corpus* act, sec. 29 (Rev. Laws, 6254). *Idem*.

23. PROHIBITION—DISMISSAL OF PROCEEDINGS.

Though a *habeas corpus* proceeding is civil in nature, and civil actions are subject to voluntary dismissal, and petitioner for a writ of *habeas corpus* can dismiss the controversy, he cannot dismiss the proceeding without an order of the court in which the proceeding is pending in regard to their custody or bail. *In re Smith*, 30.

IMMUNITY. See **SUMMONS**.

INDICTMENT. See **CRIMINAL LAW**, 6, 7; **HABEAS CORPUS**, 1, 4, 5, 6, 7, 10, 11, 12, 14, 15, 16, 17, 18, 19, 21.

INJUNCTION. See **APPEAL AND ERROR**, 5.

INSOLVENCY. See **BANKS AND BANKING**, 3.

INTERSTATE COMMERCE. See **CARRIERS**, 1, 2; **CONSTITUTIONAL LAW**, 3.

INTERVENTION. See **EMINENT DOMAIN**.

INTOXICATING LIQUORS.

LICENSES—SOCIAL CLUB—"BUSINESS."

A *bona fide* social club, which disposes, at its clubhouse, of liquors to members and guests at a fixed charge as an incident

to the general purposes of the club, the profit on sales going to pay the general expenses of the organization, is not required to take out a license by Rev. Laws, 3377-3785, approved March 15, 1905, which provides for a license upon the business of disposing of intoxicating liquors; the term "business" in such statute meaning business in the trade or commercial sense. *State v. University Club*, 475.

ITINERANT MERCHANT. See CONSTITUTIONAL LAW, 3.

JUDGMENTS.

1. WRIT OF ASSISTANCE—WHEN MAY ISSUE.

A writ of assistance only issues as part of the process to carry out a final judgment. *Gamble v. Silver Peak*, 319.

2. FINAL OR INTERLOCUTORY.

Whether a judgment is final or is only interlocutory is a question of law. *Idem*.

See APPEAL AND ERROR, 11.

JURISDICTION. See APPEAL AND ERROR, 11; COURTS; ELECTIONS, 14; HABEAS CORPUS, 1, 2, 6, 7, 9, 11, 12, 13, 15, 16, 17; MINES AND MINERALS, 21, 23.

JUVENILE COURT. See ORPHANS' HOME.

LANDLORD AND TENANT. See MORTGAGES.

LAND OFFICE. See MINES AND MINERALS, 16, 19, 21.

LEASE. See MINES AND MINERALS, 24-27.

LEWDNESS. See CRIMINAL LAW, 6.

LICENSES. See CONSTITUTIONAL LAW, 4; INTOXICATING LIQUORS.

LIENS. See BANKS AND BANKING, 11, 12, 13, 14.

LIQUORS. See INTOXICATING LIQUORS.

MANDAMUS.

ABATEMENT.

A proceeding in *mandamus* against a county officer does not abate upon the expiration of his term of office; but, the duty being a public one, his successor may be substituted. *Stone v. Bell*, 240.

MECHANICS' LIENS.

1. CLAIM FILED—SUFFICIENCY OF DESCRIPTION.

Though in a claim for lien filed the property on which the building stood for which materials were furnished was insufficiently described, where the rights of no third persons had intervened and the description was the same as that used by the owner in his lease to the present holder, it was sufficient to charge the premises with the lien. *Riverside Fixture Co. v. Quigley*, 17.

MECHANICS' LIENS—Continued.**2. SUFFICIENCY OF CLAIM FILED—DESIGNATION OF OWNER.**

Rev. Laws, 2217, provides that a lien claim shall recite the name of the owner or reputed owner, if known. Section 2215 provides that, if a person owns less than a fee simple estate, only his interest shall be subject to lien. Section 2221 provides that the interest of an owner of property, or one having an interest, may be subjected to a lien, where a building or improvement was constructed with his knowledge. A lien claim recited "that the above-mentioned 'L.' is the owner and reputed owner of said premises." The heirs of the former owner were minors, other than L., who assumed, not only to have an interest in the property, but to exercise control over the same. *Held*, the designation of such heir is sufficient to charge his interest for the entire lien. *Idem*.

3. RIGHT TO HEIR'S INTEREST DURING ADMINISTRATION OF ESTATE.

The fact that an estate is in course of administration will not prevent a lien claimant from obtaining a valid lien against the interest of an heir, as the property vested in the heirs at law on the death of their ancestor. *Idem*, 18.

4. SUFFICIENCY OF STATEMENT AS TO CONDITIONS AND TERMS OF CONTRACT.

A lien for materials and labor furnished which contains a general statement as to their nature and the time of furnishing, together with a general statement of the sum due, sufficiently states the "terms, time given, or conditions of the contract." *Idem*.

MINES AND MINERALS.**1. PATENTS—PRIORITIES.**

Where prior to the patent survey of a second mining claim and the moving of its line, the end of the line of the original claim was, on the making of the patent survey for that claim, moved so as to correspond with the call in the location notice and certificate, the owners of that claim have priority. *Indiana M. Co. v. Gold Hills M. Co.*, 158.

2. LOCATIONS—FILING OF CERTIFICATE.

Failure to properly file a certificate or amended certificate of location does not affect the rights thereunder, but merely changes the burden of proof. *Idem*.

3. CLAIM EXTINGUISHED, WHEN.

Patenting of a mining claim containing within its surface boundaries, as patented, the location monument and shaft of another claim extinguishes the latter. *Idem*.

4. ATTEMPTED AMENDMENT OR RELOCATION OF EXTINGUISHED CLAIM, EFFECT.

Vacant ground, formerly a portion of a location which has been extinguished by having its location monument and shaft included within the exterior boundaries of a patented claim, may not be held as an amended location of the original extinguished claim, but such an amended location or relocation of the original claim will be regarded as a new and independent location, and no rights can attach thereto by virtue of the extinguished location. *Idem*.

5. LOCATION—ABANDONMENT.

Abandonment of a location is largely, if not entirely, a question of intent. *Idem.*

6. LOCATION—FORFEITURE.

Forfeitures are not favored by the law, and are held to exist only when the facts clearly justify, so that the forfeiture of a mining location will not be declared merely because of the removal of the location monument where there was no intention to abandon. *Idem.*

7. PATENT—RELATION.

A patent to a mining claim relates back to the original location. *L. V. & T. R. R. v. Summerfield*, 229.

8. CONVEYANCE OF SURFACE—RIGHTS OF GRANTEE—EQUITY.

Grantees of a portion of the surface of a mining claim under mesne conveyances from the original locator are entitled to possession of the surface so conveyed, under the rule that equity will control the patent title in favor of party holding the equitable title. *Idem.*

9. CONVEYANCE OF SURFACE—DESCRIPTION.

Reference to a mining claim as a placer instead of a lode claim, in an agreement for the sale of a portion of the surface, was immaterial where the property was otherwise so described as to leave no doubt as to what was intended. *Idem.*

10. EMINENT DOMAIN—RIGHT TO AWARD—OWNER OF MINING LOCATION.

The owner of a valid, subsisting, but unpatented, lode mining claim, is entitled to an award for condemnation of a portion of the surface for a railroad right of way. *Idem.*

11. ADVERSE POSSESSION.

Facts of case considered in reference to title by adverse possession of portion of an unpatented mining claim, majority of court deeming same insufficient. *Idem.*

12. RIGHT ACQUIRED—EXTRALATERAL RIGHTS—CROSS VEIN OR LODE.

Where a mining claim containing the apex of a cross lode, lying entirely within the surface boundary of a prior claim or group owned by the same party, is held invalid, the side lines of the prior claim constitute end lines in determining the extralateral rights on the cross vein, across which, as they extend vertically downward, the lode cannot be followed. *Round Mountain Co. v. Sphinx Co.*, 392.

13. ACTION TO DETERMINE RIGHTS—BURDEN OF PROOF.

Where the location certificate of a junior mining claim recited that the claim was wholly within the boundaries of another claim, such certificate was sufficiently ambiguous or conflicting to cast upon the subsequent locator the burden of showing that the prior claim was invalid. *Idem.*

14. ACTION TO DETERMINE RIGHTS—ADMISSIBILITY OF EVIDENCE—LOCATION CERTIFICATE.

In determining priority of mining claims, the declarations contained in the record, by which the subsequent patent was obtained, were admissible in the absence of proof that the record did not state the truth. *Idem.*

MINES AND MINERALS—*Continued.*

15. VALIDITY OF LOCATION WITHIN VALID EXISTING LOCATION.

The location of a mining claim, based upon a discovery of mineral within the limits of a valid existing claim, was void. *Idem.*

16. PROCEEDINGS IN LAND OFFICE—CONCLUSIVENESS OF DECISION.

The issuance of a patent by the land department after adjudication by the proper tribunal is conclusive and not subject to collateral attack as to all matters before the tribunal for adjudication and as to all persons who were parties to such adjudication, and hence, where the owner of a mining claim did not file an adverse to a subsequent application for patent, the land department's patent to the applicant is conclusive as to the rights of the parties to the surface ground included in the application. *Idem.*

17. LANDS OPEN TO LOCATION—UNOCCUPIED AND UNAPPROPRIATED MINERAL LANDS.

Land legally segregated from occupancy or appropriation may be conveyed by the United States government as a mining claim. *Idem.*

18. VALIDITY OF LOCATION—CLAIMS ALREADY CONVEYED.

Where a claim to land legally segregated from occupancy or appropriation is conveyed, the government has no further right to patent a claim located wholly within its boundaries, since it cannot convey the same tract of land twice. *Idem.*, 393.

19. PROCEEDINGS IN LAND OFFICE—CONCLUSIVENESS.

In an equitable action to quiet title to a lode or vein which involves questions of extralateral rights not involved in the proceedings for patent, defendant, who filed no adverse thereto, is not estopped from questioning the validity of the location of the claim under which the plaintiff seeks to enforce such extralateral rights as against him. *Idem.*

20. EQUITABLE ACTION TO ESTABLISH RIGHTS—DEFENSES.

In an equitable action to determine rights to mining claims, the invalidity of plaintiff's patent may be pleaded as a defense and tried upon the same principles as an original bill in equity. *Idem.*

21. PROCEEDINGS IN LAND OFFICE—JURISDICTION TO DETERMINE PRIORITY.

The land department has jurisdiction to determine questions of priority as between conflicting lode locations embraced in the same group application. *Idem.*, 393.

22. EVIDENCE — DECLARATIONS — SELF-SERVING DECLARATIONS BY AGENT.

In an equitable action to quiet title to a mining claim, field notes made by plaintiff's surveyors, containing an exclusion of conflict area from one claim in favor of another, were properly excluded as self-serving acts by an agent of the plaintiff which could not be binding on the defendant. *Idem.*

23. ACTION TO ESTABLISH RIGHTS—JURISDICTION OF DISTRICT COURT—DETERMINATION OF PRIORITY.

In an equitable action to quiet title to a lode or vein, where the land department did not determine the question of priority

of claims in the same group, but made a double grant of the conflicting area, appearing upon the face of the later patent, the district court had jurisdiction to determine such priority. *Idem*.

24. LEASES—RIGHTS TO ABANDON.

Under the common form of lease of undeveloped lode mining property, wherein the lessor seeks to have his property developed at lessee's expense, and the latter assumes such burden, the lessee, after discovering that future expenditures would be useless, may abandon the lease. *Girton v. Daniels*, 438.

25. CONTRACTS—CONSIDERATION—ASSIGNMENT OF INTEREST IN MINE.

An assignment of a one-third interest in a mining lease was a sufficient consideration for an agreement to bear one-third of the expenses of developing the mine, though the lease proved of no value. *Idem*.

26. AGREEMENT TO RELOCATE MINING CLAIM—FAILURE TO PERFORM AGREEMENT.

Where there is an oral agreement between plaintiff, a part owner of a mining claim, and one defendant, by which the latter was to perform the assessment work on the claim for 1909, and plaintiff was to convey to him an undivided one-fourth of the claim, and defendant was also to relocate another claim in the joint names of plaintiff and defendant in consideration of plaintiff's refraining from performing assessment work on the claim, a trust relation is created, and if defendant fails to perform the assessment work, and the first claim reverts to the public, and in relocating the second one he does not include plaintiff as one of the relocators, plaintiff can enforce the trust and recover the share which he would have received had the defendant performed the contract. *Hornsilver Cases*, 447.

27. AGREEMENT TO RELOCATE MINING CLAIM—ESTOPPEL TO DENY RIGHTS IN CLAIM.

Where under an agreement by defendant with plaintiff to relocate a mining claim in their joint names, defendant relocates the claim but omits plaintiff's name, defendant, in an action by plaintiff to recover his share of the claim under the agreement, is estopped to deny plaintiff's rights in the claim and cannot question the validity of the location. *Idem*.

28. AGREEMENT TO RELOCATE MINING CLAIM—FAILURE TO PERFORM AGREEMENT.

Where a plaintiff, one of two coowners and locators of a mining claim, contracted with a defendant, whereby such defendant agreed to do the annual assessment work on the claim for the year 1909, and thus prevent a forfeiture, a trust relation was created; and when such defendant, in violation of his agreement, failed to do the work, and permitted a forfeiture, and then relocated the claim in the names of himself and two others, not including plaintiffs, plaintiffs could recover the relocated claim. *Hornsilver Cases*, 464.

29. PRINCIPAL AND AGENT—RELOCATION OF CLAIM—EFFECT OF NOTICE TO AGENT.

Under an agreement between plaintiff and defendant M., by which the latter was to relocate a mining claim, in their joint

MINES AND MINERALS—Continued.

names, defendant M. relocated the claim, but omitted plaintiff's name as a relocater and included the name of defendant S.: *Held*, that the ignorance of S. as to the agreement will not affect the right of plaintiff to enforce the agreement, as the location was made by M., and notice to an agent is notice to the principal. *Idem*.

30. LOCATION OF CLAIM—NONCONTIGUOUS TERRITORY.

The right to extend the lines of a mining claim over and across ground belonging to a prior location, and to hold segregated pieces of ground within the exterior boundaries of the location, not exceeding the maximum area of 1,500 by 600 feet allowed by law, appears to be settled. *Idem*.

31. LOCATION CERTIFICATE—CLERICAL ERROR.

The description of a mining claim in a location certificate read: "To SW. corner; thence northerly 500 ft. to N. side center post, 1,350 ft. to place of beginning": *Held*, that the failure to carry the boundary to the northwest corner was an apparent omission or clerical mistake if the claim was properly monumented at that corner. *Idem*, 465.

32. LOCATION CERTIFICATE—CLERICAL ERROR.

A location certificate is not required to be strictly exact, and an apparent clerical mistake in describing courses and boundaries will be corrected or ignored. *Idem*.

See CONSTITUTIONAL LAW, 1-4; STATUTE OF FRAUDS.

MORTGAGES.**1. MORTGAGEE IN POSSESSION—ACTION FOR RENTS—COMPLAINT.**

A complaint for the collection of rents alleged that a deed, absolute in form, was given to plaintiff by a bank, and that plaintiff gave back to the grantor a written declaration that the premises were held as security for the repayment of money deposited in the bank by plaintiff and by another depositor; that, as part of the arrangement, it was agreed that plaintiff should have possession of the premises and the rentals thereof; and that plaintiff thereafter took possession, and notified defendants of the transfer. *Held*, that the complaint was based on the theory that plaintiff was a mortgagee in possession, not by virtue of the conveyance, but under an independent agreement therefor which had been executed, so that evidence of plaintiff's entry into possession after the date of the deed and the defeasance was improperly rejected. *Douglas v. Thompson*, 196.

2. EVIDENCE — PAROL EVIDENCE — DELIVERY OF POSSESSION — AGREEMENTS.

An executed oral agreement to deliver the possession of mortgaged property is valid, and such agreement, whether made at the time of the execution of the mortgage or subsequent thereto, is an agreement independent of the mortgage, and cannot be regarded as an oral agreement, varying or contradictory to the terms of a contract in writing. *Idem*.

NEGLECTED CHILDREN. See ORPHANS' HOME.

NEGLIGENCE. See CARRIERS.

NEW TRIAL. See APPEAL AND ERROR, 14.

NOTICE OF APPEAL. See APPEAL AND ERROR, 2, 3.

OFFICERS. See GRAND JURY; HABEAS CORPUS, 18; MANDAMUS; STATUTES, 1, 2.

ORPHANS' HOME.

"REFORMATORY"—"DEPENDENT AND NEGLECTED CHILDREN."

Under the act of 1873 (Stats. 1873, c. 45), as amended by Stats. 1903, c. 41 (Rev. Laws, 4099) relative to the State Orphans' Home, providing that any district judge upon a showing that an orphan is the child of parents one or both of whom were at the time of their decease residents of the state, and that the condition of the orphan is such that it would be for his best interest to be admitted to such home, may commit the orphan to the home at the expense of the county, and that the directors at their discretion may receive any child from a living resident parent or guardian and require such parent or guardian to contribute to its support, but that no child shall be so received unless sent by the county commissioners of the county in which the child resides, who shall agree to pay for its maintenance, and juvenile court law March 24, 1909 (Stats. 1909, c. 180, sec. 7), as amended by Stats. 1911, c. 197 (Rev. Laws, 734), providing for the commission of dependent and neglected children to any suitable state institution organized for the care of dependent or neglected children, and section 1, under which "dependent and neglected children" include those having immoral, evil, or incorrigible tendencies, the court could not commit to the State Orphans' Home a dependent or neglected child who was not an orphan, since an "orphans' home" is an institution or home for the care of destitute orphans, and not a "reformatory" or institution in which young offenders are confined and instructed with a view to their reformation. *McKinnon v. Harwood*, 494.

PATENTS TO MINES. See MINES AND MINERALS.

PENALTIES. See FORFEITURES.

PERJURY. See BANKS AND BANKING, 7; HABEAS CORPUS, 17.

PETITION FOR REHEARING. See APPEAL AND ERROR, 10, 12.

PLEADING.

AID BY ANSWER.

Though a complaint in an action to foreclose a materialman's lien did not properly describe the premises on which the lien was claimed, where the answer set up the true description which was agreed to by stipulation of the parties, it will be considered in aid of the complaint so as to support a judgment entered. *Riverside Fixture Co. v. Quigley*, 17.

See MORTGAGES, 1; PROCEDURE.

POLICE POWER. See **BANKS AND BANKING**, 1.

PRACTICE. See **APPEAL AND ERROR**; **BANKS AND BANKING**, 8, 9;
MECHANICS' LIENS; **PROCEDURE**.

PRESUMPTION. See **GRAND JURY**, 1.

PRIMARY ELECTIONS. See **ELECTIONS**, 5-13.

PRINCIPAL AND AGENT. See **AGENCY**.

PROCEDURE. See **APPEAL AND ERROR**; **CRIMINAL LAW**; **ELECTIONS**;
EMINENT DOMAIN; **HABEAS CORPUS**; **PRACTICE**.

PROCESS. See **SUMMONS**.

PROHIBITION. See **CONTEMPT**.

PROSECUTING ATTORNEY, ARGUMENT OF. See **CRIMINAL
LAW**, 8, 17, 20, 21, 22, 23.

PROSTITUTION. See **CRIMINAL LAW**, 6.

PUBLIC DOCUMENTS. See **ELECTIONS**, 4.

PUBLIC LANDS. See **MINES AND MINERALS**.

PUBLIC OFFICERS. See **OFFICERS**.

PUBLIC SCHOOLS. See **STATUTES**, 6.

QUO WARRANTO. See **ELECTIONS**, 1, 14, 15.

REFORMATORY. See **ORPHANS' HOME**.

REHEARING. See **APPEAL AND ERROR**; **HABEAS CORPUS**, 22.

SALARIES. See **STATUTES**, 1, 2.

SCHOOLS AND SCHOOL DISTRICTS. See **STATUTES**, 6.

SOCIAL CLUBS. See **INTOXICATING LIQUORS**.

STATUTE OF FRAUDS.

1. **ORAL AGREEMENT TO DEVELOP MINING CLAIM.**

An oral agreement to bear one-third of the expenses of developing a mining claim covered by a two-year lease in consideration of an assignment of a one-third interest is not void under the statute of frauds, where the parties contemplate that the development work shall be completed within a year. *Girton v. Daniels*, 438.

2. **ORAL AGREEMENT TO DEVELOP MINING CLAIM.**

An oral agreement to bear one-third of the expenses of developing a mining claim covered by a two-year lease was not void under the statute of frauds, where the lease could have been terminated by the act of the parties within one year according to its specific provisions. *Idem*.

3. LIABILITY FOR EXPENSES OF DEVELOPMENT—QUANTUM MERUIT.

Where a one-third interest in a mining lease is assigned in consideration of an oral agreement to bear one-third of the expense of development, and the other contracting party pursuant to the agreement thereafter does development work and advances money to pay such expense, the assignee is liable on *quantum meruit* for his share of the work and expense, though their agreement be void under the statute of frauds. *Idem*.

4. CONTRACT TO RELOCATE MINING CLAIM.

An oral agreement between the plaintiff, a part owner of a mining claim, and one defendant, by which the latter was to perform assessment work on the claim for 1909, and plaintiff was to convey to him an undivided one-fourth of the claim, and defendant was also to relocate another claim in the joint names of plaintiff and defendant in consideration of plaintiff's refraining from performing assessment work on the claim, is not void under Rev. Laws, 1069, providing that no interest in lands shall hereafter be created, granted, or assigned unless by act or operation of law, or by deed or conveyance in writing. *Hornsilver Cases*, 447.

STATUTES.**1. STATUTORY CONSTRUCTION — APPROPRIATIONS — GENERAL FUND—SALARY OF OFFICER.**

In the absence of anything to the contrary in the statute, the act of March 17, 1911, sec. 6 (Rev. Laws, 4491), fixing the salary of the commissioner of industry, agriculture, and irrigation, and directing that it be payable in equal monthly installments by the state treasurer on warrants drawn by the state controller, is a sufficient appropriation out of the state general fund. *State v. Eggers*, 250.

2. STATUTORY CONSTRUCTION—APPROPRIATION—SPECIAL FUND—SALARY OF OFFICER—STATUTES—"PURPOSES."

The act of March 17, 1911, sec. 7, part of the act (Rev. Laws, 4486-4494) creating the state bureau, and the office of commissioner of industry, agriculture, and irrigation, and defining its objects and purposes, does not, by section 7, appropriating \$25,000 to carry out "the purposes of this act," and providing that all disbursements from it shall be on certificate of the commissioner, approved by the state board of examiners, indicate that such appropriation includes the salary of the commissioner, which section 6 fixes and declares payable in equal monthly installments by the state treasurer on warrants drawn by the state controller; Const. art. 5, sec. 21, expressly excluding salaries of officers "fixed by law" from the claims against the state which the board of examiners shall pass on, and "purposes" indicating something to be accomplished rather than an existing fact, so that the bureau and office of commissioner were but means for the subsequent accomplishment of the purposes of the act. *Idem*.

3. TITLES—SUBJECT-MATTER.

Stats. 1911, c. 133, entitled "An act concerning public schools," section 135 of which provided for a tax for the

STATUTES—Continued.

support of the public schools, was not void for embracing a subject not included in the title, contrary to Const. art. 4, sec. 17; Rev. Laws, 275. *State v. Esser*, 429.

4. CONSTRUCTION—IN PARI MATERIA.

Statutes which relate to the same subject-matter are *in part materia* and should be construed together. *Idem*.

5. CONFLICT—REPEAL.

If two statutes are irreconcilably conflicting, the last enacted controls. *Idem*.

6. SCHOOLS AND SCHOOL DISTRICTS—TAXATION—STATUTES—IMPLIED REPEAL.

The act of March 18, 1911 (Stats. 1911, c. 90, sec. 1), Rev. Laws, 3617, imposing a tax of 6 cents on the \$100 for the general school fund, was impliedly repealed by the act of March 20, 1911 (Stats. 1911, c. 133, sec. 135), Rev. Laws, 3374, imposing a tax of 10 cents on the \$100 for school purposes; the statutes being irreconcilably in conflict. *Idem*.

7. TAXATION—UNIFORMITY.

Stats. 1911, c. 133, sec. 135 (Rev. Laws, 3374), imposing a tax on all taxable property in the state for school purposes, and requiring the county commissioners to add such amount to the other taxes, could take effect during the fiscal year 1911, without violating the constitutional requirement of equality and uniformity, though it resulted in two different levies during the same fiscal year. *Idem*.

8. IMPLIED REPEAL.

Repeals by implication are not favored. *State v. Ducker*, 214.

9. APPEAL AND ERROR—REPEAL—IMPLICATION.

It cannot be said that section 387 of the practice act (Rev. Laws, 5329) was intended to cover the whole subject as to appeals so as to make it operate to repeal all other statutes on the subject, including section 6 of the act of 1865 (Rev. Laws, 4833); Rev. Laws, 4564, 6089, 6112, and 6133 providing for appeals from certain other orders. *Idem*.

10. CONSTRUCTION—LEGISLATIVE INTENT.

The legislative intent in enacting statutes must control, and rules of construction are but aids in ascertaining such intent. *Idem*.

See APPEAL AND ERROR, 4; BANKS AND BANKING, 6, 7; HABEAS CORPUS, 8, 16.

SUMMONS.

PROCESS—SERVICE—IMMUNITY.

Where a nonresident brought *habeas corpus* within the state against his wife for the possession of their minor child, he was not immune, while in the state for such purpose, from service of summons in a divorce suit; Rev. Laws, 5445, exonerating persons from arrest in a civil action while attending court as a witness, not protecting him from being served with a summons or applying to him while voluntarily in the state maintaining his own suit. *Tiedemann v. Tiedemann*, 259.

See APPEAL AND ERROR, 7.

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TAXATION.**EQUALITY.**

A basic principle of all property taxation is that it shall be uniform and equal regardless of the method adopted to arrive at the result. *Goldfield Con. M. Co. v. State*, 178.

See CONSTITUTIONAL LAW, 1, 3, 4.

TRIAL. See CRIMINAL LAW, 1, 2, 3, 4, 5, 8, 10, 11, 12, 13, 17, 20, 21, 22, 23.

TRUST FUNDS. See BANKS AND BANKING, 10-14.

WAIVER. See CRIMINAL LAW, 9, 13, 14.

"WHITE SLAVERY." See CRIMINAL LAW, 6.

WRIT OF ASSISTANCE. See JUDGMENTS, 1.

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